



**Lake Basin Development Authority v Aguko (Civil Appeal
61 of 2017) [2022] KECA 855 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 855 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 61 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

LAKE BASIN DEVELOPMENT AUTHORITY APPELLANT

AND

KABOK PETER AGUKO RESPONDENT

*(Being an appeal against the judgment (Maureen Odero, J) delivered on 23rd
February, 2017 in Employment & Labour Relations Court No. 188 of 2016)*

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. Dr. Eng Kabok Peter Aguko (Aguko or the respondent), a long serving employee of Lake Basin Development Authority (LBDA or the appellant) eventually rose to the top of the state corporation as its Managing Director. The relationship between the two soured and by a letter dated 8th July, 2015, the Board of the appellant interdicted him. In the letter of interdiction, the respondent was asked to step aside to pave way for an inquiry into various allegations made against him.
2. In a letter dated 19th October, 2015, the Cabinet Secretary of the Ministry of Environment, Water and Natural Resources communicated to the respondent a decision by the Board of the appellant to lift the interdiction and to pre-determine his contract but with full benefits of the remainder of the term. Whether the decision to end the relationship between the respondent and LBDA in this way was that of the Board or of the Cabinet Secretary is a matter that arose both at trial and here. In an apparent change of heart, however, the Board of the State Corporation refused to pay the benefits promised in the communication from the Cabinet Secretary. This aggrieved the respondent who moved the Employment & Labour Relations Court (ELRC) in Kisumu Cause No. 188 of 2016 at Kisumu for relief. In the statement of claim filed in that Court, the respondent sought a declaration that the



appellant's decision to withhold his benefits was unfair, illegal and unlawful. The respondent also prayed for a sum of Kshs. 13,622,211.70.

3. The appellant defended its decision on the basis that a Committee of Corporate Governance of the Board recommended the termination of the services of the respondent by summary dismissal and a subsequent approval by a special full Board meeting on 22nd July 2015. At trial and before us, the appellant's case is that under the Mwongozo Code, its board of management is independent and is expected to exercise independent judgment in discharge of its duties and to take full responsibility for compliance in discharge of those duties. The code is a code of governance for State Corporations issued jointly by the Public Service Commission and the State Corporations Advisory Committee.
4. In a decision of 23rd February 2017, Maureen Onyango J found in favour of the respondent and entered judgment for him in the sum of Kshs. 9,196,742/=

That decision aggrieves the appellant who moves this Court on appeal raising the following grounds;

- a. THAT the learned Judge erred in law and fact in failing to find that pursuant to the Mwongozo Code of Governance for State Corporations issued under section 90 of the State Corporations Act Cap 446 and under Articles 10(1)(c)&(2)(c) of the Constitution of Kenya, the Board of Directors of the applicant acted properly in indicting the respondent and recommending his summary dismissal.
 - b. That the learned Judge erred in law and fact in failing to find that the letter by the Cabinet Secretary dated 19/10/2015 could not be supported in law to the extent that it went against the principles and values of public service and best practices as envisaged under Articles 10(1)(c) & (2)(c) and the Mwongozo Code of Governance for State Corporations.
 - c. That the learned Judge erred in law and fact in failing to find that the respondent did not qualify in view of the fact that his contract of service was not successfully completed as the same was terminated by summary dismissal.
 - d. That the learned Judge erred in law and fact in failing to find that pursuant to sections 35(5)&(6) of the Employment Act, the respondent could not qualify for the award of both service gratuity and from the Provident Fund as the same would amount to double social security benefit.
 - e. That the learned Judge misdirected himself on the applicable law and principles, in the evaluation of evidence adduced and thereby arrived at a wrong decision in his finding.
5. This is a first appeal and the duty of the Court is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions and because the proceedings at trial were on the basis of written statements, our role does not suffer the handicap that would otherwise be present where hearing is by viva voce evidence and we would not have heard and seen the witnesses testify.
 6. I identify the following as issues to be determined in settling this appeal;
 - (i). Was the decision to pre-determine the contract of the respondent a decision of the Board of LBDA or that of the Cabinet Secretary.
 - (ii). If the answer to the above is that it was the decision was of the Board, is it legally open to LBDA to retract its decision.
 - (iii). If the decision was unlawful, are the damages awarded to the appellant justified.



7. Counsel for the appellant submitted that the committee's recommendation that the respondent be terminated was pegged on serious and incriminating findings of corruption and crime against the respondent which constituted gross conduct and which justified summary dismissal under section 44 of the *Employment Act*.
8. The starting point is that although the appellant attempts to impress on us that it was the Cabinet Secretary who made the decision to predetermine the contract of the respondent, the truth is that she was communicating a decision of a Board made in a meeting of 1st and 2nd October, 2015. Placed before the trial court were the minutes of that meeting. Under minute 9 appears the following resolution by the Board.

- “ 3. The Board recommended that;
- a. The Managing Director's interdiction be lifted.
 - b. The Managing Director's Contract be predetermined.
 - c. The Managing Director be paid the balance of his unexpired term from the date of pre-determination; and
 - d. These actions run simultaneously.”

At the time of passing this resolution, the Board was well aware of the allegations of gross misconduct made against the appellant but nevertheless recommended a benign exit for him. The Board could therefore not turn around and retract this position as nothing new, at least we have not been shown any, had arisen between 1st and 2nd October, 2015 when the decision to predetermine the contract was made and the date when it sought to disown that decision.

9. Following the decision to predetermine the respondent's contract, the appellant authority wrote twice to the respondent, on 25th November, 2015 and 28th December, 2015, assuring him that it was computing his terminal benefits which would then be paid to him. This was an affirmation, if any was required, of the resolution it had made to predetermine the respondent's contract. The circumstances do not allow the appellant to now argue that it was the cabinet secretary, and not it, that made the decision as to how it would separate with the respondent. The trial court was therefore entitled to return the following holding;

“ ... the respondent is estopped from denying or derogating from the content of the letter of termination of the claimant.”

10. Turning now to the order on damages, the only controversy is whether the respondent qualified for gratuity and payment under the provident fund. The appellant raises several arguments in this respect. The first is that gratuity is a reward given at the option of the employee and cannot be deserved where the termination of the employer's conduct is on account of gross misconduct.
11. The appellant further contends that the trial Judge could not award pension as pension disputes fall to be determined by the Retirement Benefits Authority and are not in the province of the courts. At any rate, payment of both gratuity and pension would amount to unjust enrichment under section 35 of the *Employment Act*. The Court was referred to the decisions of the Employment and Labour Relations Court in *James Musembi Mweu vs Buzeki Enterprises Limited* [2014] eKLR and *Chenga Kitsao Chengo vs Umoja Rubber Products* [2017] eKLR.



12. On his part the respondent sees the decision in James Musembi Mweu (supra) as being to the effect that an employee can only be precluded from benefitting from both payments where there is such exclusion clause in the employment contract. And that since none existed in the respondent's contract, the trial court was entitled to make an award under both heads.
13. As pointed out by this Court in *Bamburi Cement Limited vs William Kilonzo* [2016] eKLR gratuity, as the name suggests, is a gratuitous payment for services rendered. Important as well is that it is payable only if expressly provided for in the contract of employment. Being a gratuitous payment, it is not payable when the termination of employment is on account of misconduct.
14. In this matter, the contract of employment provided for payment of gratuity. Clause 8.3 reads;
- “The CEO/MD shall qualify for a one-off Gratuity calculated at a rate of 31% of the annual basic salary. The gratuity shall be subject to tax.
- In the event of termination from the Authority due to gross misconduct as provided for in the *Employment Act* gratuity shall not be payable.
- In the event that the CEO/MD is on secondment or is a member of some other retirement benefit scheme, he may opt to continue with the retirement benefit scheme to which he is already a member.”
15. The letter predetermining the contract of the respondent does not state the reason for predetermination to be gross misconduct or on any blemish on the part of the employee. The predetermination of the contract itself was not a summary dismissal. Coupled with the contractual obligation to pay gratuity, the terms of predetermination reinforced the respondent's entitlement to payment of the gratuity. The trial court cannot be assailed for affirming this entitlement.
16. As regards payment under the provident fund, the trial judge held;
- “The Claimant is also not entitled to payment of contributions by the Respondent for the Provident Fund as he ceased being a member thereof upon his withdrawal of benefits from the Fund following his letter dated 2nd November, 2015 which was acted upon by the Respondent and payment duly released to the Claimant.”
17. I have read the decision of Nduma, J in James Musembi Mweu (supra) cited to us by the appellant, in which the judge observes:
- “It should be noted that service gratuity accrues upon completion of every year of service and must not be denied retroactively unless there is a very good reason either provided under the law or the contract of service. The *Employment Act*, 2007 has no such provision and only provides for denial of payment of gratuity where an employee has alternative Pension Scheme or is covered under the National Social Security Fund (NSSF).”
18. This observation by the judge must have been informed by the statutory provisions of subsection 6 of section 35 of the *Employment Act* which reads;
- “6) This section shall not apply where an employee is a member of –
- a. a registered pension or provident fund scheme under the Retirement Benefits Act (No. 3 of 1997);
 - b. a gratuity or service pay scheme established under a collective agreement;



- c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- d. the National Social Security Fund.”

19. The objective of those provisions is to avoid what would amount to the making of double payment for gratuity and under a pension scheme unless the contract of employment expressly saves the payment of both. I am unable to read the decision in *James Musembi Mweu (supra)* as derogating from this statutory objective. The respondent referred us to the following part of that decision;

“ 16. With respect to the claim for gratuity, it is now settled law that service gratuity is payable where it is;

- i. expressly provided for in the contract of employment;
- ii. where in the absence of an express provision in the contract of service, it is shown that the employee was not registered with, and no remittances were made to the NSSF; and
- iii. where an employee was registered with NSSF and no remittances were made by the employer upon deduction; and
- iii. where the employee who is not registered with NSSF or is registered with NSSF but no remittances were made is not a member of an alternative Pension or Provident Scheme.

17. Furthermore, an employee who qualifies for service gratuity may be excluded from benefiting from the same where the contract of service has an exclusion Clause where an employee’s employment is terminated for misconduct.”

20. The exclusion clause discussed by the learned judge is in regard to a clause in an employment contract that excludes an employee from benefiting from gratuity on account of termination for misconduct. The decision does not, as suggested by counsel for the respondent, hold that there must be an express exclusion clause in an employment contract for an employee to be disentitled to payment of both gratuity and under the pension scheme. As stated earlier, there is statutory underpinning in section 35(6) for not making both payments unless the double payment is contemplated and reserved in the employment contract.

21. Critical to resolving the controversy in respect to the provident fund is an understanding of how it arose in the first place. After receiving the letter predetermining his contract, the appellant wrote a letter dated 1st November 2015 to LBDA Provident Fund requesting for release of provident funds due to him. Acting on that letter the fund paid the appellant a sum which included Kshs. 2,698,240 being the employer’s 20% contribution. At trial, the appellant asserted that in the design of the LBDA Provident Fund, the employee contributes 10% while the employer contributes 20% but that the employer’s contribution is only payable for permanent staff and not those on contract. The case by the appellant was that the amount it made on contribution should be withheld from any benefits due to the respondent. To this question the trial judge answered;

“The contract does not state that the Respondent will not pay contributions to the Provident Fund should the Claimant opt to continue. Having already paid the Provident Fund contributions, the Respondent cannot validly recall the same, as this is prohibited by the



Retirement Benefits Act. The Respondent’s attempt to deduct the sum of Shs.2,698,240 from the claimant’s terminal benefits is therefore without legal basis.”

22. I understand the provisions of clause 8.3 (reproduced earlier in this decision) as simply giving an option to the CEO/MD, who is already a member of another benefit scheme, to continue with that benefit scheme. I am unable to read it as exempting the application or rigours of the rule in section 35(6) of the *Employment Act*. Further, in this matter the respondent remained in the LBDA scheme to which the appellant had over time made contributions in his favour. While it may be, as held by the trial court, that the appellant could not recall the contributions, still, I think and would hold that the appellant was entitled, by dint of the provisions of section 35(6) of the Act, to withhold payment of the gratuity so as not to make double payment. It is my finding that the trial court’s judgement should be set aside only to the extent that the appellant shall be allowed to deduct any sum it made as contributions to the pension scheme from the gratuity due to the respondent. Only to that extent would I allow the appeal.
23. I would propose that as this appeal partly succeeds to the extent stated above, each side should bear its own costs.

JUDGMENT OF KIAGE,JA

1. I have read in draft the judgment of Tuiyott JA and the order proposed therein. I am in full agreement with the findings and conclusions reached and have nothing useful to add.

JUDGMENT OF MUMBI NGUGI, J.A

1. I have read in draft the judgment of Tuiyott JA and the order proposed therein. I am in full agreement with the findings and conclusions reached and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

