IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPEAL NO. 78 OF 2017

BETWEEN

LAKE VICTORIA NORTH WATER SERVICES BOARD.....1ST APPELLANT

HON. JOSEPH KIPCHUMBA LAGAT.....2ND APPELLANT

AND

ENG. ALFRED ODONGO AMOMBO.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya, Employment and Labour Relations Court at Kisumu, (Maureen Onyango, J.) dated 4th May, 2017

in

ELRC CAUSE NO. 16 OF 2017)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the Employment and Labour Relations Court ***(ELRC), (Maureen Onyango, J.)*** which declared the suspension of the respondent unlawful and unconstitutional, lifted the suspension, reinstated the respondent and restrained the appellant from taking any further disciplinary action against the respondent on the same grounds contained in the notice to show cause letter dated 19th August, 2016, and the suspension letter dated 13th January, 2017.

[2] By a letter of appointment dated 14th March, 2016, the 1st appellant employed the respondent as Chief Executive Officer on a three year renewable contract with effect from 2nd May, 2016 on the terms contained in the letter of appointment. Clause 5 of the contract provides that the contract of employment was for a period of three years and that the appellant reserves the right to terminate the contract prematurely depending on the performance of the respondent.

Further, clause 25 provides that the contract may be terminated by either party giving one month written notice or on payment of one month gross salary in lieu of notice. Clause 22 requires the respondent to observe the 1st appellant's rules and regulations and clause 25 states:

> *"You will also be subject to provisions of the Labour Laws (2007) and to Lake Victoria North Water Services Board Staff Rules and Regulations as issued and/or amended from time to time."*

[3] By minute 11 of the minutes of the meeting of the 1st appellant held on 19th August, 2016, the 1st appellant reviewed the accounts signatories and

> *"1. ratified and approved Eng. Alfred O. Amombo to be a mandatory signatory to all bank accounts…*

2. resolved that Eng. Peter Ouma and CPA Anthony Kisaka will continue being alternative bank signatories.

3. resolved that Ms. Naomi Jelimo, Manager Human Capital and Planning will replace CPA Fredrick Toloyi, Manager Finance as an alternate signatory with effect from 19/8/2016."

[4] By a letter dated 22nd December, 2016, signed by **Hon. Joseph Lagat *(the 2nd appellant)***, Chairman of the 1st appellant, the 1st appellant informed the respondent that it had come to the attention of the 1st appellant, amongst other things, that:

"1. You have failed to execute/implement Board resolutions and more specifically the resolution of 19/8/2016 vide Min 11 on review of account signatories.

2. Failed to communicate the resolution of 19/8/2016 to Ms. Naomi Jelimo, Manager Human Capital and Planning and Mr. Fredrick Toloyi, Manager Finance.

3. You have not to date:

(a) Provided the Board of Directors with laptops to assist them in execution of their responsibilities; and

(b) prepared for induction/training of directors to enhance their competence."

The letter stated:-

"The above are cases of blatant disobedience and insubordination hence a breach of rules and regulations governing your employment and justified under summary dismissal as per the current Human Resource Policy and Procedures Manual Clause 5.II and in line with the provisions of the Employment Act, 2007."

The 1st appellant raised other mismanagement issues and in the same letter, required the respondent by written response to show cause why disciplinary action should not be taken against him within seven days.

[5] The respondent responded to the issues raised by a letter dated 27th December, 2016. In brief, the respondent asserted that he implemented the 1st appellant's decision on review of accounts signatories and communicated the decision to the chief manager in-charge of financial matters; that a tender had been awarded for supply of laptops; that the training was outside his control and that other mismanagement issues arising were mere allegations. In a nutshell, the respondent denied contravening the rules and regulations governing his employment.

[6] The 1st appellant held a meeting on 12th January, 2017 and heard the respondent's oral submissions. By a letter dated 13th January, 2017, the 1st appellant informed the respondent that it had deliberated on his response and found it unsatisfactory in respect to two issues namely, failure to implement resolution on review of account signatories and issues of mismanagement raised by managers at the Lake Bogoria Resort retreat.

By the same letter, the 1st appellant suspended the respondent from exercising his designated duties with immediate effect pending investigation of the matters raised.

[7] On 24th January, 2017, the respondent filed a claim in the ELRC seeking the lifting of the suspension and general damages for unlawful suspension. The claim was based essentially on the ground that the disciplinary committee flouted the provisions of the Employment Act, the employment contract and principles of natural justice both procedurally and substantively. The respondent also filed a notice of motion seeking, *inter alia,* for reinstatement pending the hearing of the suit.

The 1st appellant filed a memorandum of response to the claim. In addition, Hon. Joseph Kipchumba Lagat *(Lagat), (2nd appellant)* the Chairman of Board of Directors of the appellant filed a replying affidavit sworn on 3rd February, 2017 to the application. At the hearing of the application, the trial judge made an order consolidating the application and the claim. The replying affidavit of Lagat was treated as his witness statement. Thereafter, the respondent gave brief evidence. Lagat then adopted his statement and was cross-examined.

[8] The learned judge considered the claim and stated as a principle that a court should not intervene in internal disciplinary process unless there are exceptional circumstances. It framed the issue for determination to be, whether there were exceptional circumstances warranting the court's intervention.

The court considered the terms and conditions of the employment and made a finding that the suspension was unlawful as there was no proof that the respondent's terms of service provided for it. Further, the court made a finding that the termination of the respondent's employment by resolution of the 1st appellant at a meeting of 26th January, 2017 without giving the respondent an opportunity to be heard was in breach of the provisions of **section 41** of the Employment Act and invalid.

Lastly, the court reviewed the reasons given by the 1st appellant for the suspension and made a finding that the respondent satisfactorily responded to the issue of review of account signatories; that the issues raised at the Lake Bogoria retreat were vaguely framed; the respondent had hardly any time to act on them, and, that the reasons given for suspension were not valid.

[9] Mr. Kenei for the appellant condensed the numerous grounds of appeal into three main issues namely; whether the learned judge went beyond the scope of the claim by entering judgment on matters that were not pleaded by the respondent; whether it was within the jurisdiction of the court to stop the disciplinary proceedings and whether the learned judge shifted the burden of proof to the appellants.

The respondent has filed grounds for affirming the decision seeking an order that the decision of the trial court be affirmed on the further ground that the entire disciplinary process was procedurally unfair in that the appellant suspended the respondent before investigations were concluded.

[10] The first finding of the learned judge was that the suspension was unlawful. This finding was made on the basis that the appellants did not produce documents such as the Human Manual Resource Policy and Procedures to show that suspension was provided for in the terms and conditions of service of the respondent. It is clear that the statement of claim was based on unlawful and unfair suspension. The appellants state in the grounds of appeal and in the submissions that this issue was not pleaded and that the respondent did not testify regarding that issue.

Mr. Rotich for the respondent submitted that the suspension of an employee must have contractual basis or authority and that the unilateral suspension of an employee would constitute a breach of contract.

[11] The appellants' counsel cited several authorities including the **Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR** for the principles that parties are bound by their own pleadings; that the court is itself bound by the pleadings of the parties; that it is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties have raised by the pleadings and that a decision on a claim or defence not made or raised by, or against a party, is equivalent to not hearing him at all and thus a denial of justice.

Further, **section 47(5)** of the Employment Act provides:

> **"For a complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer."**

In our view, that burden of proof applies *mutatis mutandis* to a complaint for unfair and unlawful suspension.

[12] From the averments in the respondent's statement of the claim, it is clear that the respondent claimed that the decision to suspend him was unlawful for, *inter alia*; the disciplinary committee as constituted and how the hearing was conducted flouted the provisions of the Employment Act, the employment contract and principles of natural justice; the appellants had predetermined the verdict; the respondent was suspended for failing to enforce an illegal resolution; the respondent was not accorded a chance to appeal and, the respondent was suspended on unfounded accusations.

The respondent did not claim in the statement of claim or in the two affidavits he filed or in his evidence that the suspension was unlawful because the terms of service did not provide for it.

[13] The appellants in the notice to show cause and in the suspension letter referred to documents which authorized the action such as the Human Resource Policy and Procedures Manual; Mwongozo guidelines and PSC Human Resource Policy and Procedures. The respondent stated in the concluding paragraph of the response dated 27th December, 2016 to the notice to show cause partly thus:

> **"… I reiterate that I have not in any way contravened rules and regulations governing my employment that would justify disciplinary action contemplated under human resource policy and procedure manual and the Employment Act, 2017."**

In addition, the respondent's counsel in his submission filed in the trial court on 7th March, 2017, in relation to issues whether the suspension was lawful and justified submitted in part:

> *"The claimant is not challenging the respondent's right to discipline him but rather the quarrel is whether the applicable disciplinary process was lawful and justified."*

The counsel then submitted on why the suspension was unlawful and unfair without raising any issue on the contractual right or legal authority of the appellants to suspend the respondent. Moreover, the respondent was required to prove that suspension was not provided for in the contract of employment before the appellants could be called upon to justify the suspension.

The respondent was the Chief Executive of the 1st appellant and had custody of all relevant documents relating to the employment. He was also represented by a counsel throughout the proceedings.

[14] It is evident from the foregoing that the issue of whether or not the suspension was unlawful because the contract of employment did not provide for it was not a specific issue arising from the pleadings and was not framed nor left to the court for determination. Further, the respondent did not rely on it nor was the respective counsel heard on it or submitted on it. In the premises, the learned Judge acted in excess of jurisdiction in an adversarial system and thus made a substantial error of law.

[15] As regards the reasons for suspension, it is clear from the suspension letter that the respondent was suspended for two reasons namely, failure to implement the 1st appellant's resolution on review of account signatories and the respondent's alleged conduct at the Lake Bogoria

Resort retreat. The suspension letter indicated that the suspension was pending investigations on the matters raised.

This is not a case of an express termination of contract of employment where the employer by virtue of **section 43(1)** and **45(2)** of the Employment Act, is required to prove reasons for termination.

> **Section 43(2)** provides:
>
> **The reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.**

[16] In our view, where suspension is the basis of the claim and not the termination itself, like in the present case, the principle in **section 43(2)** aforesaid applies in equal force to reasons for suspension. A court is ill equipped to make business decisions for the business enterprises and organizations. If the decision is genuine having regard to the environment in which it is made, the court defers to the decision maker and does not usurp the function of the decision maker by imposing its own abstract decision on what should have been a reasonable decision in the circumstances.

[17] The court made a finding that the respondent had given satisfactory explanation why he did not implement the review of account signatories. In the response to the letter to show cause, the respondent told the appellant that he had implemented the decision. In his statement of claim and in the evidence, he admitted that he had not fully implemented the resolution. He gave two reasons for his failure, firstly, that Naomi Jelimo was not a senior staff member and did not qualify to be an accounts signatory and, secondly, the resolution of the 1st appellant was inconsistent with the provisions of the 1st appellant's Financial Management Manual (Manual) which provides that the Finance manager is a mandatory signatory. The 1st appellant in the response and in the evidence of its managing director stated that it had not adopted the said Financial Management System Manual. The respondent in his evidence stated that the manual was adopted in 2010 before he joined but did not produce the resolution adopting the manual. The learned judge reasoned that whether the Manual was adopted or not was not in the respondent's knowledge and that the respondent explained that it governed the operations of the appellant.

[18] The appellant stated in its replying affidavit that the respondent attended the meeting of the 1st appellant where a resolution of the review of account signatories was made and that he did not raise any issue with the resolution or implementation before the letter to show cause was issued.

It is also evident that the explanation which the respondent gave in his response to the letter to show cause and which caused the appellant to suspend the respondent is different from the explanation which he gave in court. The learned Judge erroneously relied on the explanation given by the respondent in court and not on the explanation tendered to the appellant before its decision. Moreover, there was no tangible evidence to contradict the appellant's evidence as the governing body that it had not adopted the Manual or shown that its resolution to review the accounts signatories was invalid in law.

In the light of the above circumstances, the finding that the respondent had given satisfactory explanation to the 1st appellant for failure to implement the review of accounts signatories was not only unsupported by evidence but also a usurpation of the powers of the 1st appellant to reach its independent decision based on the reasons it genuinely believed to exist at the time of the decision.

[19] The respondent in the response to notice to show cause stated that the allegations of misconduct at the Lake Bogoria Resort retreat were mere general allegations and declined to respond to the allegations. The 1st appellant stated that it received credible evidence of misconduct and required the respondent to make a preliminary representation in the notice to show cause after which it reached a decision that there was need for further investigations to ascertain the veracity of the allegations and suspended the respondent pending the investigations. If the contract of employment or the law provides for suspension pending investigations or alleged misconduct, the outcome of the investigation would guide the employer to determine whether or not a disciplinary action is justified. The court, as happened in this case, should not interfere with the rights of the employer and shield an employee from the imminent investigations solely on the ground that the initial allegations of misconduct were vaguely framed

[20] The last reason for interference with the suspension was that the 1st appellant at a meeting of 26th January, 2017, had adopted a resolution of the special Board meeting terminating the respondent's employment. The learned judge reasoned that the decision to terminate the employment was made without giving the respondent an opportunity to be heard.

The appellants complain that the learned judge erred in law by arriving at a decision that the services of the respondent had been terminated when the issue was not pleaded, without evidence and without giving the appellants an opportunity to be heard. The respondent's claim was solely based on unfair and unlawful suspension. Early in the proceedings, the court had made an order for maintenance of status quo.

> ***"Meaning that the claimant remains on suspension but no disciplinary hearing should take place pending further orders of the court."***

At the hearing of the claim, the 2nd appellant stated that the 1st appellant did not act on the resolution of the Special Board and that the respondent had not been dismissed. Further, the respondent did not claim to have been dismissed.

It is evident that the court acted in excess of jurisdiction and without evidence in finding that the services of the respondent had been terminated.

[21] In support of the notice of the ground for affirming the decision, the respondent's counsel stated that the learned judge forgot to address the issue of the process followed by the appellants to suspend the respondent and submitted that the entire process was procedurally

unfair. Counsel however failed to substantiate this ground. The appellants served the respondent with a notice to show cause specifying the grounds of the intended suspension. He was given an opportunity to explain in writing which he did. In addition, he appeared before the appellant and made oral representations before a decision was made. We are satisfied that the respondent was accorded a fair procedure.

[22] Finally the learned judge erred in law in granting orders which were not prayed for in the statement of claim since the only reliefs sought by the respondent were the lifting of the suspension, general damages for unlawful suspension and costs.

[23] The appellants claim the costs of the appeal. On the other hand, the respondent contends that the appellants should be ordered to pay all the costs including the costs of the respondent.

The trial judge ordered each party to bear its own costs of the suit. The costs are at the discretion of the court but they normally follow the event. This was a dispute between an employee and employer. The 1st appellant – the employer is a public body and the respondent had a right to seek redress in court. It is just in the circumstances that no order as to costs should be made.

[24] For the foregoing reasons, the appeal is allowed. The judgment and decree of the Employment and Labour Relations Court is set aside and the respondent's claim is dismissed. There shall be no orders as to the costs of the appeal and the claim in the court below.

DATED and Delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

…….…….

JUDGE OF APPEAL

J. MOHAMMED

……..……..

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR