



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 167 OF 2014

BETWEEN

MOSES KIPLAGAT CHANGWONY.....APPELLANT

AND

TANA & ATHI RIVER DEVELOPMENT AUTHORITY....RESPONDENT

(An appeal from the Judgment and Decree of the Industrial Court at Milimani, Nairobi (Nduma Nderi, J.) dated 24th May, 2013 in Industrial Court Case No. 785 of 2010)

JUDGMENT OF THE COURT

The appellant, Moses Kiplagat Changwony, has appealed to this Court against the judgment of the Industrial Court which dismissed his claim against the respondent for unlawful and constructive dismissal, reinstatement, salary and allowances, gratuity, interest, costs and damages.

Briefly, the appellant was employed by the respondent on or about 22nd November 1987 in the position of an Administrative Stores Officer and Logistics Support Manager. He resigned shortly thereafter to pursue other interests.

On 14th November 2002, he was appointed Managing Director of the respondent for a term of 3 years which term expired and his employment was extended for a second term of 3 years. The appellant stated that throughout the period of service, he rendered dedicated service to the respondent and turned around its fortunes through re-engineering its strategies, uplifting staff, obtaining support and enhancing public/private partnership initiatives.

The appellant's contention was that sometime in 2006, the respondent's Chairman, the late Alex Muriithi, begun interfering with the day to day operations of the respondent and unlawfully assumed executive powers, including the setting up of an Audit Monitoring and Evaluation Committee.

According to the appellant, on 25th January 2006 whilst he was visiting the respondent's Tana Delta Projects, the respondent's Chairman convened an extraordinary Board of Directors meeting where the Audit Monitoring and Evaluation Committee tabled a list of alleged misdeeds on the part of the appellant, and which had not been brought to the appellant's attention.

The allegations included the alleged sale of the respondent's plot at Upper Hill Nairobi and improper purchase of the Managing Director's official Mercedes Benz vehicle. Since the appellant denied the claims and asked for time to prepare his full defence against the allegations, the meeting resolved the Audit Monitoring and Evaluation Committee to carry out further investigations and the Chairman of the Board was asked to write to Kenya Anti-Corruption Commission (KACC) to request the conduct of further investigations into the allegations. The appellant stated that the deliberations were irregular and unlawful and set out the particulars of irregularity in the Claim.

Following a refusal by the appellant to proceed on leave, an extraordinary meeting of the respondent's Board held on 14th February, 2006, unanimously resolved to place the appellant on suspension.

The appellant contended that the decision to suspend him was illegal as the Minister responsible for Regional Development and not the Board had the mandate to make such a decision; that following completion of the investigations by the Kenya Anti-Corruption Commission, the appellant was charged in *Criminal Case No. 2273 of 2006, Republic vs Moses Kiplagat Changwony*, and was subsequently acquitted on 30th April 2010, nearly 4 years after he resigned.

It was the appellant's further contention that, during the period of suspension, the respondent declined to pay his salary, rent or any of his allowances contrary to the stipulations of the staff manual; that the suspension went on indefinitely, though it was specified to be for a period of two months.

The appellant also pleaded for payment of his rent and other allowances in a letter dated 25th April 2006, and in a letter dated 17th May 2006, the Chairman responded that the payments would be made upon recession of the suspension. The extended period without a salary and allowances, caused the appellant to tender his resignation by a letter dated 27th July 2006, so as to seek alternative employment.

It was the appellant's case that his resignation was contrived under duress and amounted to unprocedural, unfair and constructive dismissal, the particulars of which were set out in the Memorandum of Claim.

The appellant therefore prayed for judgment against the respondent for;

i. A declaration that the Claimant was unlawfully dismissed from his employment or/and was constructively dismissed.

ii. Reinstatement of the Claimant to his post of Managing Director without loss of salaries, allowances and other benefits from the date of suspension, to be ascertained by this Honourable Court.

In the alternative judgment against the respondent in the sum of Kshs 9,720,000.00/= being salary and allowances entitlements to the Claimant for three (3) years.

iii. Gratuity entitlement for six (6) years at the rate of 31% per every year worked being Kshs 3,013,200.00/=.

iv. Interest on items (c) and (d) above at court rates.

v. Costs of the suit

vi. Damages

vii. Any other relief that this Honourable court shall deem fit and just to grant in the circumstances.

In its defence, the respondent denied having unfairly and constructively dismissed the appellant and stated

that, in his capacity as the Chief Executive Officer of the respondent, the appellant was charged with the responsibility of ensuring efficient execution of the policy and mandate of the organization and for the control and management of its day to day business. The appellant was also expected to practice good corporate governance and ensure that the respondent's resources were properly utilised.

Furthermore, the appellant's appointment was subject to the provisions of the Tana & Athi Rivers Development Authority Act Cap 443, the State Corporations Act Cap 446, the Tana & Athi Rivers Development Code of Regulations, (*the TARDACODE*), and various office of the President circulars.

The respondent contended that the appellant was suspended to pave way for investigations, on account of impropriety and mismanagement on his part, which was discovered by the Inspectorate of State Corporations (an independent public office as provided by **section 18** and **19** of the **State Corporations Act, Cap 446 Laws of Kenya**) and the Audit Monitoring and Evaluation Committee of the respondent's Board, during the financial year 2004 – 2005.

The respondent specified that the respondent's Board did not terminate the appellant from employment, but rather took the disciplinary action of suspending him to allow for investigations under the **TARDACODE regulation 7.15.4**. The Regulations also provided that on account of his suspension he would not be entitled to salary and allowances.

In a letter dated 24th July, 2006 addressed to the Minister for Regional Development Authority, the appellant resigned from the employment with the respondent. As a result, the respondent denied that the appellant was entitled to any benefits and or any of the reliefs sought in the Memorandum of Claim.

The suit was part heard by Chemmutut, J, and according to an order of the learned judge of 15th April 2011, the hearing was to dispense with oral evidence and proceed by way of documents on the record and submissions to the court. The appellant filed written submissions on 6th November 2012 and the respondent filed theirs on 7th December 2012. In a further mention, the parties agreed that Nduma Nderi, J., would write the judgment.

In the award of the Industrial Court, the learned judge concluded that the appellant's employment was neither wrongfully, unfairly nor constructively terminated. The court found that the disciplinary action taken against the appellant was justified and well founded in the relevant statutes and the disciplinary code of the respondent at the time; that given the gravity of the matters under consideration, the disciplinary proceedings were inordinately long.

The appellant was dissatisfied by the decision of the court, and filed an appeal to this Court. He advanced 10 grounds of appeal which the parties compressed in their submissions under the following heads; the trial court did not consider the documentary evidence that was placed before it; that the court wrongly found that the appellant's employment was not wrongfully and unfairly constructively terminated; that the appellant was entitled to payment of the salary and allowances due under the employment contract.

Both the appellant and the respondent filed comprehensive written submissions upon which they enjoined the Court to consider in order to arrive at its determination. Accordingly, we consider that the issues for our determination are;

- i. Whether the court wrongly concluded that the appellant's employment was not wrongfully and unfairly constructively terminated;*
- ii. Whether the appellant was entitled to the salary and allowances claimed;*
- iii. Whether the trial court failed to consider the documentary evidence that was placed before it.*

As a first appellate court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions. Although there was no oral

evidence, we bear in mind that we have not seen or heard the witnesses and give due allowance for this.

Selle v Associated Motor Boat Company Limited [1968] EA 123.

With these principles in mind we will now address the issues. Regarding the issue that the learned judge was wrong to conclude that the appellant's employment was not unfairly or constructively terminated, the appellant's complaint is that he was unlawfully suspended by the respondent's Board, which was not authorized to do so; that this function was within the remit of the Minister responsible for Regional Development based on a recommendation made by the Board; that the trial court failed to take into consideration the provisions of the Employment Act; the Tana and Athi River Development Authority Code; that he was unfairly or constructively dismissed by the respondent's conduct towards him in the performance of his duties.

Upon considering the circumstances and events leading to his suspension, including the alleged usurpation of his authority as Managing Director by the respondent's Chairman and Board, the criminal charges made against him, followed by the indefinite suspension of his employment, the learned judge took the view that the claim of unprocedural, unfair or constructive dismissal was unfounded.

To determine the issue of whether the court wrongly concluded that the appellant's employment was not unprocedurally, unfairly or constructively terminated, we consider it necessary to begin by assessing whether the events leading to his suspension were unfair and unprocedural, and thereafter, whether the suspension without pay amounted to a constructive dismissal.

In the Memorandum of Claim, the appellant separately particularized the unfair and constructive dismissal which can be summarised as; appointment by the Chairman of an internal audit team to investigate the appellant without his involvement in the exercise; failure of the investigating committee to interview the appellant on the allegation; failure to avail a copy of the internal audit report and the report of the Inspectorate of State Corporations to the appellant; failure to give the appellant an opportunity to defend himself against the allegations leveled against him during and after the Board meetings of 26th January, 2006 and 14th February, 2006; failure to finalize investigations into the appellant's case within two (2) months as indicated in the letter of suspension; subjecting the appellant to an unreasonably long and oppressive suspension without pay; and the appellant's acquittal from the criminal charges affirmed his innocence.

The evidence shows that following investigations carried out within the respondent, the Inspectorate of State Corporations between 2004 and 2005 found cases of mismanagement of the respondent by the appellant. A report was submitted to the Chief Executive of State Corporations, the Attorney-General's office and the respondent's Audit, Monitoring and Evaluation Committee.

The findings included the irregular procurement of the Managing Director's official vehicle, Mercedes-Benz 220 registration number KAN 665 U amounting to a loss of Kshs. 1,765,000/=; irregular agreement to lease the respondent's equipment to China Road and Bridges Corporation at the rate of Kshs. 5,000 per day instead of Ministry of Public Works and Roads approved rates; irregular procurement of 100,000 Eucalyptus seedlings for the year 2004/2005 and irregular procurement for the supply of 59,332 banana suckers worth Kshs. 5,026,390 through single sourcing by the appellant contrary to procurement procedure; irregular procurement of diesel involving the appellant and one Mr. Bosco Cheron, the Logistics and Administration Manager at the time and the irregular appointments and re-engagements by the appellant where he was implicated in flouting the respondent's regulations.

The respondent's Board recommended that the Audit, Monitoring and Evaluation Committee undertake further investigations, and the Chairman was requested to write to KACC. In tandem with this, the Board placed the appellant on suspension vide a letter dated 14th February, 2006, after he refused to proceed on leave to allow for independent investigations. The letter made it clear that the appellant's ***"...suspension was necessitated by the gravity of the numerous allegations leveled against you; of impropriety, corruption, abuse of office, and other irregularities, which have been brought to the attention of the Board..."***

The letter further read;

“While you are on suspension, the Board Audit Committee and the Inspectorate Division of the State Corporations Inspector General will carry out a thorough audit and prepare a report for the TARDA Board, within 2 (two) months- 60 days”.

The appellant being subject to the respondent’s rules, regulations and guidelines was suspended in accordance with ***Regulation 7.15 (e) of the***

“TARDACODE” entitled ***The Disciplinary Procedures*** that stipulated;

“Notwithstanding the provisions of this sub-section, any employee who misappropriates or is deemed to have misappropriated or embezzled Authority Funds deliberately, willfully or negligently authorizes, or does anything that could be construed as authority for wrongful payment out of Authority funds even though no payment is made, or puts to personal use any Authority funds without proper authority, associates with or is in association with an individual, individuals, group, company or partnership through which or whereby the Authority loses funds or any valuable asset as a result of improper documentation either by himself or the third party, or through documents submitted with fraudulent intentions, will be liable to dismissal with loss of all benefits. The Authority may however suspend the employee without pay pending investigation to establish the degree of the employee’s involvement or complicity in the offence or the outcome of any court action consequential thereto.” (emphasis ours)

From the facts, the appellant’s suspension arose from the findings of the Inspectorate of State Corporations, which allegations pointed to mismanagement and impropriety on his part. Clearly, the action to suspend him was to pave way for investigations, with a view to ascertaining his involvement or complicity (if any). The suspension was intended to limit any possible interference in the process. By placing the appellant on suspension did not mean that his employment was terminated, and therefore providing him with an opportunity to be heard at this stage was premature given the ongoing investigations.

As to whether the letter of suspension signed by the Chairman on behalf of the respondent was irregular, we consider that it was issued in terms of ***Regulation 7.15.4*** of the ***TARDACODE***, and the Board through the Chairman had the requisite authority to do so in the best interest of the corporation.

In view of compelling circumstances leading to his suspension, we are not satisfied that the appellant was subjected to an unfair and unprocedural process by the respondent. The fact that he was subsequently charged before the *Anti-Corruption Court in Criminal Case No. 2273* with two counts of abuse of office contrary to section 101(1) of the Penal Code and a third count of conspiracy to defraud contrary to section 317 of the Penal Code reinforces the position that the decision made to suspend him was not prompted by malice or bad faith. It was arrived at out of necessity to allow for comprehensive and uninhibited investigations. Like the learned judge, we find that the actions taken by the respondent were procedural and in accordance with the law.

On the complaint that he was unfairly and constructively dismissed due to the prolonged suspension, the appellant claimed that the respondent failed to finalize the investigations into the allegations against him within the two (2) months period stipulated in the letter of suspension; that this subjected him to an unreasonably long and oppressive period without pay, yet he still remained in the respondent’s employment; that the conditions he was subjected to during his suspension forced him to tender his resignation, resulting in an unfair or constructive dismissal.

Although there is no express provision in the ***Employment Act, 2007*** dealing with constructive dismissal, in the recent case of ***Coca Cola East & Central Africa limited vs Maria Kagai Ligaga [2015] eKLR*** which decision was cited with approval in ***Board of Governors Cardinal Otunga High School, Mosochi vs Elizabeth Kwamboka Khaemba [2016] eKLR***, this Court upheld a decision by the Employment and Labour Relations Court, where the court cited with approval several authorities, among

them, *Western Excavating (ECC) Ltd v Sharp [1978] 1 CR 222* where Lord Denning held;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

As seen earlier, **Regulation 7.15.4** of the **TARDACODE**, provided for suspension without pay. It was therefore was a laid down requirement of the respondent. Therefore the respondent was not authorized to pay any salary or allowances to the appellant during that period. Since the appellant was also subject to the respondent’s employment regulations, he was not entitled to payment of his salary and allowances during the period of suspension.

It is not in dispute that period of investigations was lengthy. But it will be borne in mind that, the respondent was a State Corporation, and it followed that various Government agencies such as KACC, the Attorney General’s Office and the Criminal Investigations Department were required to undertake the investigations so as to reach a conclusive finding. We agree with the learned judge that it cannot be gainsaid the allegations against the appellant were severe and required to be handled assiduously, and with uncompromising attention to detail. As a result, the respondent cannot be faulted or held responsible for the extended period taken to complete the investigations, as they were not entirely within its remit or control.

Considering that the respondent was not authorized to pay the appellant whilst he was on suspension, and given that it could not be faulted for the prolonged investigations, we find that, the sequence of events leading to the appellant’s resignation cannot be considered as conduct demonstrative of an intention to terminate the appellant’s employment contract. To the contrary, we find that the respondent’s actions were in compliance with the Employment Act, the TARDACODE, and the appellant’s decision to resign was unilateral and unsolicited, and cannot be attributed in any way to the respondent.

On the claim for reinstatement, the appellant abandoned this prayer in his submissions, and for this reason, we do not deem it necessary to address this issue.

This brings us to the issue of whether the appellant was entitled to salaries, rent and allowances for the second contractual period. We have found that the appellant was not dismissed from employment, but voluntarily resigned on 24th July 2006. By the time of his resignation, he had been placed on suspension without pay, so that upon his resignation, no salary or allowances had accrued to him. Additionally, having resigned before the second contract period expired, he was not entitled to salary, rent or allowances for the unexpired term of the contract. In the circumstances, we find that the claim for salary or allowances is unmerited, and the respondent is not liable to pay the amount claimed in the alternative under Item (b) of the Memorandum of Claim.

On the claim for gratuity, the evidence shows that the appellant received gratuity for the initial period of employment, 14th November 2002 to 14th November 2005. As did the learned judge, we have been through the record, and can find no computation or authorization for payment of gratuity for the second contractual period. Without this, there is no rationale upon which to award gratuity for this period, and on that basis this ground fails.

Finally, we turn to consider whether the trial court analysed the documentary evidence. It was the appellant’s submission that a comprehensive list of documents were submitted to support his claim for constructive dismissal which he claimed the trial court did not take into account. In particular, the appellant took issue with the court’s finding that:

“With respect to the claim for gratuity for six years at the rate of 31% per every year worked, no

sufficient materia has been placed before me to determine the matter in favour of the claimant particularly with respect to the contract that had already been served. The pleadings do not disclose the basis of the claim and since no viva voce evidence was adduced at all in the matter, the court finds that the claimant has failed to prove he is entitled to payment of the gratuity and the prayer is dismissed accordingly.”(emphasis ours)

From the excerpt it is apparent that the learned judge’s observation should be considered in the light of the gratuity payment already discussed above, and not the entire claim. The reference to viva voce evidence was merely a confirmation or restatement of the order of Chemmutut, J. of 15th April 2011.

Having said that, from our findings, we are satisfied that the learned judge considered the pleadings, the documentary evidence, and the submissions of the parties, and claim, evaluated and analysed the evidence, and in so doing rightly dismissed the appellant’s claim for unprocedural, unfair and constructive dismissal.

In view of the above, we come to the conclusion that the appeal lacks merit, and is accordingly dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 24th day of February, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR