



Ndegwa v National Environmental Trust Fund (NETFUND) (Cause 649 of 2019) [2024] KEELRC 1288 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 649 OF 2019**

JK GAKERI, J

MAY 27, 2024

BETWEEN

CATHERINE GAKII NDEGWA CLAIMANT

AND

NATIONAL ENVIRONMENTAL TRUST FUND (NETFUND) ... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim dated 2nd October, 2019 filed on even date.
2. The Claimant's case is that he was employed by the Respondent in November 2006 as its Chief Executive Officer (herein after C.E.O) until 20th September, 2018 when she left office.
3. The Claimant avers that her contract of employment was renewed from time to time and the last was due to expire on 31st October, 2019 and served diligently.
4. It is the Claimant's case that sometime in 2018, the Respondent's Board of Trustees formed a view that the C.E.O needed qualifications in financial matters and as a consequence entered into a Mutual Separation Agreement with the Claimant dated 28th February, 2018 under which the Claimant would be paid;
 - a. 12 months gross salary.
 - b. Gratuity as per the contract of employment.
 - c. Ex gratia payment of 3 months basic pay.
5. It is the Claimant's case that the 12 months' salary and ex-gratia payments remains outstanding and gratuity covered two years as opposed to three.
6. That the contract of employment provided for reference of disputes to arbitration.



7. The Claimant prays for;
 - i. 12 months gross salary Kshs.4,350,128.40.
 - ii. 3 months basic salary ex-gratia payment Kshs.1,087,532.10.
 - iii. One (1) year gratuity Kshs.121,600.60.
 - iv. Interest on the above.
 - v. Costs of this suit.
 - vi. Any other relief the court may deem fit to issue.

Response

8. In its reply to the Memorandum of Claim filed on 14th November, 2019, the Respondent denies having employed the Claimant or that the Claimant served diligently.
9. It also denies having entered into a mutual separation agreement and, if any, it was illegal, fraudulent and void as there was no approval by the National Treasury as the C.E.O had served for 12 years.
10. That the contract of employment articulated the terms unequivocally and provided for the dues payable in the event of a termination of the contract.
11. The Respondent avers that mutual separation agreement in question was entered into contravention of the law and existing guidelines and intended to defraud the Government of Kenya.
12. It is the Respondent's case that Claimant was aware of the procedure to be complied with in the variation of terms of employment and the mutual separation agreement was illegal, fraudulent and void.
13. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

14. On cross- examination, the Claimant confirmed that she served the Respondent as the C.E.O for 12 years after a competitive recruitment process and was bound by the terms of the contract of employment.
15. That the contract of employment did not envisage a method of termination other than those expressly provided.
16. The Claimant confirmed that the Board of Trustees gave her an exit plan and a separation deed which she accepted and all trustees attended the meeting.
17. According to the Claimant, the separation agreement was drafted by the Respondent's advocates, was presented to her and she signed the same.
18. It was the Claimant's evidence that the Board of Trustees originated the strategic change of direction in 2018 and was her employer.
19. On re-examination, the Claimant testified that she signed the separation agreement as the Board of Trustees requested her to leave before the contract lapsed in 2019.



Respondent's evidence

20. RWI, the Head of Finance in 2018 testified that he was unaware of the signing of the Separation Agreement or its existence but admitted that there was evidence of a mutual separation agreement signed by the Board of Trustees.
21. The witness admitted that he had no evidence of any fraud or undue influence by the Claimant.
22. It was his evidence that the subsequent Board of Trustees sought a legal opinion from the Office of the Attorney General.
23. Strangely, the witness contradicted himself by testifying that the Claimant was entitled to the amount claimed and was not.
24. That the amount tabulated by the settlement agreement was not budgeted for and policies were not complied with.
25. Finally, the witness testified that the separation agreement was in breach of law and procedure.

Claimant's submissions

26. As to whether the court has jurisdiction to hear and determine the suit, counsel cited the decisions in Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others (2012) eKLR and Kennedy Amuhaya Wanyonyi V African Medical and Research Foundation (2014) eKLR to submit that it had the arbitration clause in the employment contract notwithstanding.
27. As regards the validity of the deed of separation, counsel cited the provisions of the [Law of Contract Act](#) and the decisions in Miriti V Thananga Tea Growers Sacco Ltd & another (2014) eKLR and Garvey V Richard (2011) JMCA 16 to urge that the deed of separation had all the essential elements of a contract and parties are bound by the terms of their contract unless the contract is vitiated by fraud, coercion or undue influence as pleaded and proved.
28. Reliance was also made on the decisions in National Bank of Kenya Ltd V Pipeplastic (K) Ltd & another (2022) EA 503 and Godfrey Allan Tolo V Tobias O. Otieno & another (2022) eKLR on mutual termination of a contract by parties.
29. Counsel submits that the parties entered into a contract consensually well aware of its obligations and are thus bound by its terms.
30. Counsel wondered why the Respondent was contesting the validity of the agreement having already paid gratuity for 2 years. In any case, it was the stronger party in this case and cannot allege that the agreement was illegal.
31. On the reliefs, counsel urges that the Claimant was entitled to the prayers sought.
32. Under the further submissions, the Claimant submits that the validity of the contract of employment dated 12th October, 2016 was not in issue as parties are bound by their pleadings and cited the decision in Speaker of County Assembly Kisii County & 2 others V James Omamba Nyarge App No. 51 of 2014 to submit that the Claimant's contract was regular.
33. Counsel urges that the Respondent tendered no evidence to prove that the separation agreement required designated signatories including the Parent Ministry.
34. Finally, counsel submits that the employment contract was not a bar to the parties to negotiate a mutual separation agreement.



Respondent's submissions

35. The Attorney General isolated three (3) issues for determination on the lawfulness of the contract dated 16th October 2016 as well as the separation deed and the reliefs sought.
36. On the 1st issue, the Attorney General relied on the provisions of Section 6(2) of the [State Corporations Act](#), Mwongozo Code of Governance for State Corporations and the sentiments of the court in Peter Macithi Muigai & 2 others V Ben Chikamai & another and Republic V Cabinet Secretary, Ministry of East Africa Community & Regional Development Ex parte – Omar Mohammed Sheikh (2019) eKLR to urge that the Claimant was not eligible for a 3rd term as it was contrary to the provisions of [State Corporations Act](#) and Mwongozo.
37. According to counsel, the Claimant ought to refund the monies paid to her.
38. On the second issue, the Attorney General submits that since the contract of employment was a nullity, the separation agreement was invalid as the National Treasury was not represented.
39. According to the Attorney General, an employee cannot draw benefits from an illegal contract and cited Attorney General V Law Society of Kenya & another (2017) eKLR and Ahmed Abdikadir & Co. Advocates V National Bank of Kenya (2006) eKLR to buttress the submission.
40. The Attorney General further submits that even assuming that the contract of employment was valid, it had a termination clause at the instance of either party.
41. The Attorney General argues that the separation agreement was signed in secrecy.
42. That clause 29 of the contract of employment superceded all agreements entered into by the parties including the separation agreement.
43. Reliance was made on the decision in Hosea Sitienei V University of Eldoret & 2 others (2018) eKLR to urge that a decision made by an improperly constituted board is null and void and no benefit can accrue from an illegal contract.
44. Finally, the Attorney General urges that the Claimant's 3rd term of service was illegal.

Findings and determination

45. It is common ground that the Claimant was an employee of the Respondent as its Chief Executive officer from 1st November, 2006 for 5 years (1st November, 2011 to 30th October, 2016) and 1st November, 2016 to 30th October, 2019 but left on 30th September, 2018 under a contested Separation Agreement.
46. The Claimant's testimony that she served diligently was unchallenged, controverted or contested by the Respondent.
47. While the Claimant testified that the Separation Agreement was negotiated against the backdrop of a strategic change in the Respondent's Board of Trustees focus on the skill set of the C.E.O to finance, the Respondent tendered no controverting evidence and none of its current or former trustees testified to demonstrate the board's position.
48. Whereas the Respondent argues that both the contract of employment dated 12th October, 2016 and the Deed of Mutual Separation Agreement and Settlement dated 28th February, 2018 are unlawful and illegal, the Claimant argues that the two contracts are valid and enforceable legally binding agreements.



49. The issues for determination are;
- i. Whether the Claimant's contract of employment dated 12th October, 2016 was valid and lawful.
 - ii. Whether the Separation Agreement dated 28th February, 2018 was valid and legal.
 - iii. Whether the Claimant is entitled to the reliefs sought.
50. On the 1st issue, the Attorney General argues vociferously that contract was unlawful because it violated the provisions of the *State Corporations Act* and the Mwongozo Code of Conduct for State Corporations (herein after Mwongozo).
51. The Claimant on the other hand submits that her employer was the Respondent's Board of Trustees which made all decisions germane to employment and had the power to hire and fire the C.E.O and had given her a 3 year contract due to lapse on 30th October, 2019.
52. The contract is explicit that it was grounded on the Claimant's performance appraisal by the Board of Trustees, as it was a renewal.
53. Needless to belabour, the Claimant was at all material times reporting to the Respondent's Board of Trustees and would not be eligible for another term.
54. The contract of employment provided for gratuity at 31% of the Claimant's annual basic salary.
55. For unexplained reason(s), the Respondent accorded the Claimant a fixed 3 year contract as the previous two contracts were 5 years each.
56. Noteworthy, the Respondent only raised the issue of unlawfulness of the contract of employment dated 12th October, 2016 in its submissions dated 9th April, 2024 as it was not an issue at the hearing.
57. Indeed, in its response dated 14th November, 2019, the Respondent admits that the contract dated 12th October, 2016 was the foundation of the employment relationship and further argues that the Separation Agreement was contrary to the terms previously agreed by the parties on October 12th 2016.
58. In his further submissions in response to the Respondent's submissions, the Claimant's counsel submits that the Respondent's challenge that the contract between the Claimant and the Respondent was an afterthought and was contrary to the cardinal rule of pleadings that a party is bound by its pleadings.
59. It is trite law that parties are bound by that pleadings.
60. In *Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 others (2014) (Supra)*, the court stated that;

“In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence as the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation”.



61. The foregoing is fortified by the Court of Appeal decision in *David Sirona Ole Tukai V Francis Arap Muge & 2 others* (2014) eKLR where the court expressed itself as follows:
- “In an adversarial and system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the others case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”
62. Strangely, the Respondent is raising the issue after the Claimant filed her case against it yet it has not denied that its Board of Trustees signed the Separation Agreement and why it did not realize its mistake, if any, before or immediately after the Claimant’s departure.
63. In this case, the Respondent did not plead that the contract of employment dated 12th October, 2016 was unlawful or illegal.
64. Paragraph 8(c) (d) and (9) of the Reply to the Memorandum of Claim are unambiguous that the Respondent acknowledges that there was a valid contract of employment between the parties and could not therefore submit that it was illegal or unlawful and cite judicial authorities to reinforce an unpleaded matter.
65. As the issue was not raised in the pleadings and did not arise during the hearing, it was a none issue and cannot be raised by way of submissions. It is trite that submissions are neither pleadings nor evidence.
66. Flowing from the foregoing, it is clear that the lawfulness of the contract of employment is not an issue for determination and warrants no determination and falls by the way side as it was unpleaded.
67. The Respondent faults the separation agreement on the premise that it was not signed by the National Treasury and the representative of the Parent Ministry neither attended the meeting nor signed it.
68. Second, the separation agreement was based on an illegal contract as adverted to above.
69. It is common ground that the Claimant entered into a Separation Agreement with the Respondent and it was duly executed by the parties on 28th February, 2018.
70. It was signed by 4 trustees of the Respondent including the Chairperson of the Board of Trustees.
71. The Claimant maintains that the Separation Agreement is a valid and legally enforceable agreement as inter alia the Respondent did not prove that it was vitiated by illegality, mistake, undue influence, duress or misrepresentation.
72. In fact, RWI admitted on cross-examination that the separation agreement was duly signed by the parties thereto and further admitted that he had no evidence of fraud or undue influence by the Claimant and that the Claimant was entitled to the amount claimed, evidence he contradicted on re-examination.
73. Further, the Respondent faults the Separation Agreement on various grounds including that it was anchored on an invalid contract, an argument the court has already disposed of.



74. Second, that even assuming that the contract signed on 12th October, 2016 was valid, it provided for termination by three months' notice by either party.
75. The court finds this argument unpersuasive as paragraph 28 of the contract provided for a unilateral separation not bilateral or mutual as the Separation Agreement on record.
76. Clause 28 states clearly that "either party". The notice by either party to the other does not require acceptance or discussion. It is a unilateral decision. It is not negotiable.
77. Similarly, the submission that clause 29 of the contract superceded any other form of agreement including the Separation agreement lacks persuasion too. The clause is unambiguous that;

"This contract supersedes all other agreements and/or arrangements 'hitherto' entered into (if applicable) with you and NETFUND".
78. A plain reading of Clause 29 reveals that it is backward looking not forward looking. It refers to previous agreements as opposed to un contemplated future agreements or arrangements.
79. The court is left wondering how a contract would supercede a non-existent agreement or arrangement. Would the parties not be fettering their freedom to contract even in unforeseeable circumstances which would be detrimental to them?
80. In the court's view, Clause 29 could not supercede the Separation Agreement conducted after the contract of employment.
81. More significantly, however, since the contract signed by the Claimant on 12th October, 2016 was an agreement, it is trite that whatever is created by agreement may be extinguished or dissolved by agreement encapsulated by the maxim eodem modo quo oritur eodem modo dissolvitur.
82. See the sentiments of the court in Godfrey Allan Tolo V Toblas O. Otieno & another (2022) eKLR.
83. A reading of the Separation Agreement shows that it was entered into against the background of the employment contract effective 1st November, 2016.
84. It is clear that the parties had agreed to discharge the contract of employment by the Mutual Separation Agreement as provided by paragraph 23 of the agreement which is clear that the Respondent was unconditionally released and discharged by the employer on 30th September, 2018. The agreement is explicit that the Claimant's performance had been exemplary and the separation was amicable.
85. It is equally not in dispute that the agreement was concluded at the instance of the Respondent when it shifted its strategic direction on the qualifications of the Chief Executive Officer.
86. The Respondent provided no scintilla of evidence that the Claimant initiated or influenced or precipitated the separation or played any role in the drafting of the separation agreement. It is discernible that the agreement was drafted by a person trained in law.
87. Finally, paragraph 6.4 of the Separation Agreement clearly articulates the intention of the parties to create a legally enforceable agreement.
88. Similarly, the Respondent faults the Separation Agreement on the ground that it was not approved by the State Corporations Advisory Committee (SCAC), the Parent Ministry, National Treasury and the Salaries and Remuneration Commission (SRC).



89. Regrettably, the Respondent adduced no evidence to prove that a Separation Agreement between the CEO of the Respondent and the Board of Trustees required approval by SCAC, Parent Ministry, National Treasury and the SRC.
90. Neither the National Treasury nor the SRC or SCAC is involved in the hiring or termination of heads of parastatals unless the law or constitutive documents of the Parastatal so provide.
91. The respective Board of Directors are the employer unless the law expressly require Ministerial approval or appointment.
92. In this case, the Claimant was an employee of the Board of Trustees of the Respondent, was answerable to and reported to it.
93. The Respondent tendered no evidence of specific law or policy the Separation Agreement violated or breached.
94. Closely related to the foregoing is the Respondent's submission that the Separation Agreement was signed by independent trustees of the Respondent's board and representatives of the National Treasury and Parent Ministry neither attended the meeting nor sign the agreement.
95. Regrettably, the Respondent adduced no evidence of the total number of members of the Respondent's Board of Trustees, which meeting the representatives of the National Treasury and the Parent Ministry did not attend or whether they were supposed to sign the Separation Agreement.
96. Simply defined, a contract is a legally binding agreement made between two or more parties.
97. In *R. V Clarke (1927) 40 C.L.R. 227*, Higgins J. stated as follows:

“ An agreement is the result of the mutual consent of two parties to contain terms.”
98. Lord Diplock used similar sentiments in *Sudbrook Trading Estate Ltd V Eggleton (1983) 1 A.C 444* as follows;

“ A contract is complete as a contract as soon as the parties have reached agreement as to what each of its essential terms is or can with certainty be ascertained . . .”
99. It is trite that a contract comes into existence when an offer by one party is unconditionally accepted by the other and the parties must have intended to create a legally binding agreement, some consideration must pass.
100. Additionally, the purpose of the agreement must be legal and parties must have had the requisite capacity to contract.
101. In the instant case, the Claimant and the Respondent entered into a legally binding agreement as the Claimant accepted the Respondent's offer.
102. Contrary to the Attorney General's submission that the Separation Agreement was signed in secret, RWI adduced no evidence on the alleged secret location, who the attendees were and how they had been invited. After all, RWI was not a member of the Respondent's Board of Trustees and did not attend its meetings nor was he aware of agenda of its meetings.
103. RWI, however, admitted that there was a Separation Agreement between the Claimant and the Respondent duly executed by both parties.



104. Puzzlingly, the Attorney General argues that the representatives of the Parent Ministry and the National Treasury were unaware of the Separation agreement, yet there are public officers who the Attorney General refused, neglected or failed to call as witnesses to buttress its case.
105. It is intriguing that neither the Attorney General nor the Respondent could prevail on any former or current member of the Board of Trustees to give evidence on the circumstances leading to and actualization of the Separation agreement on record which is a legally binding contractual relationship.
106. Even assuming that the Separation Agreement was vitiated, the Respondent has not laid any factual foundation of the alleged vitiating element(s).
107. In the circumstances, it is the finding of the court that the Respondent has failed to prove on a preponderance of probabilities that the Separation Agreement was unlawful.

Whether the Claimant is entitled to the reliefs sought

- i. 12 months gross salary Kshs.4,350,128.40/=
 - ii. 3 months basic salary as ex-gratia Kshs.1,087,523.10
 - iii. Payment of 1 year gratuity Kshs.121,600/=
108. Clause 3 of the Deed of Mutual Separation Agreement and Settlement dated 28th February, 2018 provided for the foregoing payments and the same are awarded as prayed.
 109. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms;
 - a. 12 months gross salary Kshs.4,350,128.40
 - b. One year gratuity Kshs. 121,600.60
 - c. 3 months ex-gratia payment Kshs.1,087,523.10

Total Kshs.5,559,252.10

110. Having regard to all the circumstances of this case, it is only fair that each party bears its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI



JUDGE

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