



**Aseka v Mumias Sugar Co Ltd (in receivership) (Cause 240 of 2018)  
[2023] KEELRC 1164 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1164 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 240 OF 2018**

**S RADIDO, J  
MAY 17, 2023**

**BETWEEN**

**NASHON ASEKA ..... CLAIMANT**

**AND**

**MUMIAS SUGAR CO LTD (IN RECEIVERSHIP) ..... RESPONDENT**

**JUDGMENT**

1. Nashon Aseka (the Claimant) was granted a contract by Mumias Sugar Co Ltd (the Respondent) to serve as the Chief Executive Officer. The contract was to expire on 15th June 2020.
2. On or around April 29, 2018, the Claimant committed the Respondent to a financial consultancy agreement with a third party. The consultant was to assist the Respondent secure technical financial funding of at least US \$ 250,000,000 and a maximum of US \$ 500,000,000.
3. The agreement also provided that the consultant would be entitled to a facilitation fee of US \$ 10,500.
4. On or around June 5, 2018, the Respondent suspended the Claimant for 21 days to enable investigations why the Claimant had committed it to a doubtful financial transaction without following due process and laid down policies (the Respondent terminated the consultancy agreement on June 5, 2018).
5. The investigations were not completed within the 21 days and on June 22, 2018, the Respondent notified the Claimant of the extension of the suspension for 14 days.
6. On June 29, 2018, the Claimant moved the Court alleging that the suspension was unlawful (the Claimant sought a declaration that the suspension was unlawful and an order restraining the Respondent from terminating his employment).
7. At the same time, the Claimant filed a Motion under a Certificate of Urgency seeking injunctive orders against the Respondent from terminating his employment, and lifting the suspension.



8. The Court heard the Motion ex-parte on July 2, 2018 and issued an order restraining the Respondent from extending the Claimant's suspension pending the hearing of the suit (the Court set inter-partes hearing for July 10, 2018).
9. On same day that the Claimant was battling in Court, the Respondent issued a notice to show-cause to him instructing him to respond within 5 days.
10. On July 3, 2018, before the lapse of the 5 days given to the Claimant to respond, the Respondent sent an invitation to the Claimant to attend a disciplinary hearing on July 9, 2018.
11. The Claimant responded to the show-cause on July 6, 2018 and the disciplinary hearing proceeded on July 9, 2018. The Claimant attended the hearing.
12. On the same day, the Respondent issued a letter to the Claimant, informing him of the termination of his contract (the letter was posted to the Claimant and he testified that he received it on July 16, 2018).
13. In spite of the developments, the Respondent did not bother to alert the Court even from the bar that a decision had been taken the previous day to terminate the Claimant's contract.
14. The Court took arguments on the Motion as scheduled on July 10, 2018, and reserved ruling to September 17, 2018.
15. Pending the delivery of the Ruling, the Court directed that the status quo be maintained (the parties made filings in the interlude which indicated that the Claimant's contract had been terminated).
16. Because of the changed circumstances, the Court dismissed the Claimant's Motion on September 17, 2018.
17. As a result, the Claimant filed an Amended Statement of Claim on January 22, 2019. The Respondent filed an Amended Response on March 22, 2023, after securing leave of the Court.
18. The Cause was heard on March 23, 2023 and the Claimant testified. The Respondent opted not to call a witness or lead evidence.
19. The Claimant filed his submissions on April 12, 2023 and the Respondent on May 8, 2023.
20. The Claimant identified 2 Issues for determination:
  - i. Whether the Claimant's termination (sic) was unlawful?
  - ii. Whether the Claimant is entitled to compensation as particularised in his Amended Statement of Claim?
21. The Respondent also outlined 2 Issues for determination, to wit:
  - i. Whether the Claimant's termination was unlawful?
  - ii. Whether the Claimant is entitled to compensation?
22. The Court has considered the pleadings, evidence and submissions.

### **Breach of contract**

### **Non-payment of salaries**

23. The Claimant testified that due to financial constraints, the Respondent delayed payment of salaries and that at times the salaries were paid in part and in instalments.



24. The Claimant testified that he was owed Kshs 9,600,000/- in salary arrears.
25. The Respondent, however, resisted this head of the claim on the ground that the Claimant had not provided the requisite evidence as contemplated by sections 107(1) and 109 of the *Evidence Act*.
26. Section 17 of the *Employment Act*, 2007 places an obligation on the employer to pay the entire amount of wages either in cash or into a bank account when it falls due. The Respondent did not rebut the Claimant's oral testimony that the salary would delay due to financial constraints and would be paid in instalments.
27. Still on wages, section 20 of the *Act* requires the employer to issue an itemised pay statement (generally called a pay slip) at or before the payment of wages.
28. The Respondent as the custodian of employee records including pay records did not place before the Court any such records to demonstrate that all of the Claimant's salaries were paid as they fell due at the end of the month.
29. The Court will, therefore allow this head of the claim.

#### **Accrued leave**

30. The Claimant testified that he had accrued leave for the period of service which commuted amounted to Kshs 1,200,000/-.
31. The Claimant's contract provided for 46 leave days spread over the year and that untaken leave would be compensated.
32. Clause 30.9 of the Respondent's Human Staff Manual contemplated the commutation of untaken leave on termination of employment.
33. Section 28 of the *Employment Act*, 2007 provides that annual leave shall be with full pay. The Claimant served the Respondent for slightly above 1 year.
34. The Respondent indicated in its submissions that it did not oppose this head of the claim.
35. The Court finds that he has made a case for an award of Kshs 1,200,000/- on account of accrued leave (being equivalent one 1-month salary).

#### **Unfair termination of employment**

##### **Procedural fairness**

36. The Claimant challenged the procedural fairness of the termination of his contract on the grounds that he was not accorded a hearing and that the disciplinary hearing/process was conducted in breach of a court order issued on July 2, 2018
37. The Claimant was issued with a show-cause notice dated July 2, 2018, which set out the allegations he was to confront. The notice requested him to respond within 5 days and he did on July 6, 2018.
38. On June 28, 2018, the Claimant moved the Court and he obtained an order on July 2, 2018. The note of the judge indicates that the following orders were to issue:

The Respondent is stopped from further extending the suspension of the Claimant pending the hearing and determination of this suit. The application be served. The same be responded to within 7 (seven) days. Inter-partes hearing on July 10, 2018.



39. On July 3, 2018, the Respondent invited the Claimant to attend an oral disciplinary hearing on July 9, 2018, and he was advised of the right to be accompanied by a colleague.
40. The Claimant attended the hearing and on the same day, the Respondent issued a termination letter. The Claimant was informed of the right of appeal.
41. The Court has severally perused the record. There is no affidavit on record to show that the Respondent was served with the orders of July 2, 2018 or at all.
42. The Court also notes that the order did not restrain the Respondent from continuing with or commencing disciplinary proceedings against the Claimant. The orders only stopped the extension of the suspension.
43. Since the Respondent issued a show-cause setting out the allegations against the Claimant, and requested him to respond and further granted him an opportunity for an oral hearing which he attended, the Court is satisfied that the Respondent met the threshold for procedural fairness as contemplated by sections 35(1) and 41 of the *Employment Act, 2007*.

### **Substantive fairness**

44. By dint of sections 43 and 45 of the *Employment Act, 2007*, the employer is expected to justify and prove the fairness and validity of the reasons for dismissing an employee.
45. The reasons the Respondent gave for terminating the Claimant's contract were:

you performed your duties carelessly and negligently when you failed to follow due process in the procurement of the financial consultancy agreement between Mumias Sugar Co Ltd (MSC) and Mr Issa Uwimana dated April 29, 2018 and the consultancy arrangement with the African Female Reintegration Centre Foundation (AFRCF) of March 28, 2018 and proceeded to commit the company on the same without approval and notification to the Board. Contrary to Board directives, you negligently committed MSC further by approving payments under the above mentioned agreement with Mr Uwimana and arrangement with AFRCF thus exposing the company to further risks associated with the unauthorised consultancies.
46. The Respondent did not present any witness to justify and or prove the fairness and or validity of the reasons. It, however, relied on an intense cross-examination of the Claimant to demonstrate that the allegations were justified.
47. The Claimant did not deny entering into the consultancy agreement with Mr Uwimana or that part payment was made to him.
48. The Claimant also admitted that prior to entering into the consultancy agreement, he had not consulted with the Board.
49. However, to justify the reasons, the Respondent needed to do a little bit more. It should have isolated the policies which required the Claimant to consult with and or seek approval of the Board before signing the consultancy agreement. It was also required to demonstrate that approval of the Board was required before payment.
50. The Court is of that view because the Respondent ought to but did not draw a dichotomy or contours of the prerogatives of the Claimant as the Chief Executive Officer/management and the roles and functions of the Board.



51. There was also no evidence as to whether the Board's role was policy guidance or part policy guidance and part management with respect to the consultancy agreement dated April 29, 2018 or the consultancy arrangement with African Female Reintegration Centre Foundation (AFRCF) dated March 28, 2018.
52. The Court, therefore, finds that the termination of the Claimant's employment was devoid of substantive fairness.

### **Compensation**

53. The Claimant served the Respondent for slightly over a year and in consideration of the length of service, the Court is of the view that the equivalent of 1-months' salary as compensation would be appropriate.

### **Reinstatement**

54. Although the Claimant sought reengagement, he acknowledged that the Respondent has since been placed under receivership.
55. On that account, the Court is of the view that reinstatement would not have been an appropriate remedy.

### **Conclusion and Orders**

56. In light of the foregoing, the Court finds and declares that although the termination of the Claimant's employment was procedurally fair, it was devoid of substantive fairness for failure by the Respondent to justify or prove the reasons.
57. The Court also finds that the Respondent was in breach of contract in respect to non-payment of salaries and accrued leave.
58. The Court awards the Claimant:
  - i. Salary arrears Kshs 9,600,000/-
  - ii. Accrued leave Kshs 1,200,000/-
  - iii. Compensation Kshs 1,200,000/-Total Kshs 12,000,000/-
59. The award to attract interest at court rates from date of judgment.
60. The Claimant to have costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 17<sup>TH</sup> DAY OF MAY 2023.**

**Radido Stephen, MCI Arb**

**Judge**

### **Appearances**

For Claimant Mr Odeny instructed by Bruce Odeny & Co. Advocates

For Respondent Mr Mutuli, Legal Officer, Mumias Sugar Co Ltd (in receivership)



Court Assistant Chrispo Aura

