



Njuguna v Principal Secretary Ministry of Lands, Housing & Urban Development & another (Cause 1276 of 2014) [2023] KEELRC 2571 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2571 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1276 OF 2014
MA ONYANGO, J
OCTOBER 5, 2023

BETWEEN

PETER WACHIRA NJUGUNA CLAIMANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 1ST RESPONDENT

NATIONAL HOUSING CORPORATION 2ND RESPONDENT

JUDGMENT

1. The Claimant was until 28th July, 2014 the Managing Director of National Housing Corporation, a state corporation established under the *Housing Act* and operating under the Ministry of Lands, Housing and Urban Development, having been appointed through Gazette Notice No. 13950 of 27th September, 2012, by the Minister and letter of appointment dated 19th November 2012 signed by the National Housing Corporation Board Chairman, pursuant to the gazette notice.
2. By letter dated 28th July, 2014 signed by the Principal Secretary Ministry of Lands, Housing and Urban Development, the Claimant was suspended from duty. On 4th August 2014 the Claimant received another letter of suspension signed by the Board Chairman of National Housing Corporation confirming the earlier suspension from duty by the Principal Secretary, Ministry of Lands, Housing and Urban Development.
3. The suspension letters from both the Principal Secretary Ministry of Lands, Housing and Urban Development, the 1st Respondent herein, and the National Housing Corporation, the 2nd Respondent, referred to a report from the Inspectorate of State Corporations on a Special Audit conducted on the affairs of the National Housing Corporation which “made several grave findings that raise malpractices” by the Claimant and which recommended that the Claimant be relieved of his duties.



4. By letter dated 30th July 2014 the Claimant replied to the suspension letter dated 28th July, 2014. In the reply the Claimant confirmed that he handed over his duties to Eng. Kamau Maina, an official from the Ministry, as directed in the suspension letter. The Claimant further outlined his achievements and performance during the 21 months that he had been in office and denied the accusations against him in the suspension letter. The Claimant further requested for a copy of the Audit Report which he lamented had not been shared with him and that he had not been given an opportunity to respond to the audit queries.
5. In his Memorandum of Claimant dated 4th August, 2014 the Claimant sought a declaration that the suspension letter issued by the 1st Respondent was unlawful and therefore null and void. He also sought a declaration that any decision made by the Board of Directors of the 2nd Respondent on the basis of the said suspension letter and the alleged special audit conducted by the Inspectorate of State Corporations was null and void.
6. The Claimant was supplied with a copy of the Special Audit Report through the 2nd Respondent's letter dated 27 August 2014 which also required him to furnish the 2nd Respondent with his response to the issues raised in the suspension letter by 3rd September, 2014.
7. Vide a further letter dated 2nd September, 2014 the 2nd Respondent forwarded to the Claimant a copy of his performance appraisal conducted on 11th December, 2013, a copy of performance contract between the 1st and 2nd Respondents board for the financial year (FY) 2013- 2014, a copy of the performance contract between the 2nd Respondent and the Claimant for the FY 2013 – 2014, a copy of the 2nd Respondent's evaluation report for the FY 2013 – 2014 and a summary of the 2nd Respondents performance evaluation scores from 2004/5 – 2013/14. He was required to respond to the issues raised in the letter of suspension by 8th September, 2014.
8. By letter dated 8th September, 2014 the Claimant wrote to the 2nd Respondent pointing out that the issue of his suspension was pending before both a Parliamentary Committee and the Industrial Court. He further informed the 2nd Respondent that it had emerged that the Audit Report may have been unlawfully or irregularly altered and that the author of the report had denied marking the recommendation that led to the suspension of the Claimant. The Claimant stated that it would be prejudicial in the circumstances for him to issue a compressive response to the letter of suspension from the 2nd Respondent.
9. By letter dated 2nd October, 2014 the Claimant was dismissed from service.
10. By letter dated 19th November, 2014 the Respondent notified the Claimant of his financial dues being salary earned from 1st October, 2014 and leave earned being 44 days. The Total dues were Ksh. 548,774.15 less liabilities of Ksh. 231,898 and PAYE of Ksh. 164,632.25 leaving a balance of Ksh.152,243.90.
11. Following the summary dismissal, the Claimant applied for and was granted leave to amend his Memorandum of Claim on 24th November, 2014. It appears as if there is no copy of the Amended Claim or record as what is on record is a copy of the draft Amended Claim attached to the Claimant's application dated 5th November, 2014 seeking leave to amend the claim.
12. The forgoing notwithstanding, both Respondents filed their responses to the Amended Claim.
13. In the Amended Memorandum of Claim, the Claimant seeks the following remedies:
 - a. A declaration that the suspension letter issued by the 1st Respondent dated 28th July, 2014, is unlawful and is therefore null and void.



- b. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - c. Terminal benefits computed as follows
 - i. Three months' salary in lieu of notice Ksh. 1,380,000
 - ii. Gratuity at 31% of annual basic salary of Ksh 4,560,000
 - iii. Unpaid leave for 2 years at
ksh. 50,000/= per year Ksh. 100,000
 - iv. Unpaid salary for August and September Ksh.520,000
 - v. Salary for the remaining period of the contract 380,000x 12 4,560,000
TOTAL 7,973,600
 - d. Costs of the suit plus interest
 - e. Damages for wrongful/unfair termination
 - f. Any other relief this Honourable court may deem fit
14. The 1st Respondent filed a Response to Amended Memorandum of Claim dated 18th December, 2014 in which it denies the averments in the Amended Memorandum of Claim.
 15. The 1st Respondent avers that the Claimant received and responded to the letter dated 29th May 2014 from the Inspector General (State Corporations) by the Claimant's letter dated 30th May, 2014. That the Claimant cannot state that he was not aware of or privy to the report tabled by the Inspectorate of State Corporations. That the Claimant's allegations that the report was doctored and/or altered ought to have been reported to the relevant authorities for investigation.
 16. The 1st Respondent states that the Claimant was paid all his terminal dues and is not entitled to any of the reliefs sought in the Amended Memorandum of Claim.
 17. The 2nd Respondent filed an Amended Response to Claim dated 1st April, 2015.
 18. The 2nd Respondent stated that by letter dated 29th May, 2014 the Inspectorate of State Corporations wrote to the Managing Director of the 2nd Respondent informing him that a team of inspectors had been appointed to carry out a management audit of the 2nd Respondent. That on 25th July, 2014 the Principal Secretary in the Ministry of Lands, Housing and Urban Development submitted to the Board of the 2nd Respondent the Special Audit Report. That on 30th July, 2014 at a special meeting the Board considered the report and resolved to suspend the Claimant and a letter dated 4th August 2014 was issued to the Claimant, requiring him to show cause why disciplinary action should not be taken against him. That the Claimant responded through his letters dated 6th August and 8th September, 2014.
 19. The 2nd Respondent states that it furnished the Claimant with a copy of the Report of the Inspector General Corporations on 27th August 2014 as directed by the court and further supplied the further documents sought by the Claimant by its letter dated 2nd September, 2014.
 20. That upon further investigation the 2nd Respondent established that the Claimant:



- a. Permitted by omission or commission for procurement procedures and regulations to be flouted in the acquisition of goods and services relating to the Enterprise Resources Programme (ERP).
 - b. Permitted unbudgeted and or unapproved expenditures to be incurred in both the Enterprise Resource Programme (ERP) and Expanded Polystyrene (EPS) projects.
 - c. Permitted the 2nd Respondent's resources to be committed and paid out to third parties without and/or beyond any performance guarantees in the procurement of the Enterprise Resources Programme (ERP).
 - d. Carried out irregular appointments and/or deployment of senior staff without the Board's approval or consent.
 - e. Failed to ensure the achievement of the 2nd Respondent's financial and operating goals and objectives as set out in the performance contract and reflected in the performance contracting rating and approval by the Board.
21. It is the 2nd Respondent's averment that these findings demonstrated that the Claimant had by his conduct indicated that he had fundamentally breached his obligations under his contract of employment with the 2nd Respondent.
 22. It is the 2nd Respondent's averment that following the Claimant's refusal to submit himself to disciplinary process, it set in motion the disciplinary process against him and finally resolved to summarily dismiss him with effect from 2nd October, 2014.
 23. At the hearing of the case the Claimant testified on his own behalf while the 1st Respondent called THEODORA KERUBO GICHAMA, the then Acting Inspector of State Corporations who testified as RW1. The 2nd Respondent called SAMMY CHEPKWONY, the Chairman of the 2nd Respondent's Board of Directors who testified as RW2. The witnesses by and large reiterated the evidence in their pleadings as already summarised herein above. The parties thereafter filed submissions.

Analysis and Determination

24. I have carefully considered the pleadings, evidence adduced and submissions of the parties. The issues arising for determination in my view are:
 - a. Whether the Special Audit Report on the affairs of National Housing Corporation (NHC) the 2nd Respondent herein dated July, 2014 was doctored/altered.
 - b. Whether the Respondent had valid reasons to terminate the employment contract of the Claimant.
 - c. Whether the Respondent complied with fair procedure in terminating the employment contract of the Claimant.
 - d. Whether the Claimant is entitled to the remedies sought.

Report of Special Audit Report on Affairs of NHC

25. The Claimant pleaded in his Amended Memorandum of Claim that the report tabled by the Inspectorate of State Corporations which informed the basis of his dismissal was doctored to include a recommendation that the Claimant be relieved of his duties, while the original report recommended that the Claimant be more friendly to the staff.



26. The Claimant submitted the two reports in his List and Bundle of Documents dated 7th August 2017 as documents 12 and 13 at pages 25 and 70 respectively.

At page 44 of the 1st report (page 69 of the bundle) it is recommended:

“Recommendation

In order to promote a conducive work environment, the Managing Director should change his style of management to be more accommodative and friendly.”

27. In the second report at page 115 of the Claimant’s said bundle the document at page 45 thereof reads:

“Recommendation

In order to promote a conducive work environment and in view of the irregularities cited in the report mainly occasioned by the Managing Director, the audit team recommends that the Managing Director be relieved of his duties.”

28. At the hearing the Claimant testified that the report recommending that he be relieved of his duties was different from one submitted before a Parliamentary Committee which indicated that the report may have been altered. He testified that the parliamentary Committee summoned him, together with the chairman of the 2nd Respondent, the Minister and the Principal Secretary.
29. He testified that the report was tabled in Parliament by a Mr. Kinoti, a representative of the office of Inspector General Corporations. That Mr. Kinoti informed the Parliamentary Committee that the reason he presented the report was because the recommendation in the report used to suspend the Claimant was different from the Report presented to Parliament.
30. The Claimant was however unable to adduce evidence to prove that the report was tabled in Parliament and discussed and specifically that the report tabled in Parliament was the correct report and that the same did not recommend his removal from office.
31. RW1 further testified that reports from the office of the Inspector State Corporations are marked “Confidential”. She testified that the report on NIC was transmitted to the Principal Secretary by transmission letter.
32. RW1 explained that the report at page 25 of the Claimant’s bundle did not come from the office of Inspector State Corporations as it is not marked “Confidential”.
33. From the evidence on record it is evident that the source of the report which the Claimant alleges is the official report before it was altered has not been proved. It is further evident that the report received and acted upon by the 2nd Respondent is the official report and that it recommended that the Claimant be relieved of his duties.

Whether the 2nd Respondent had valid reason to terminate the contract of the Claimant

34. The special Audit Report states under methodology that it reviewed legislation governing the management aspect of the 2nd Respondent, studied the 2nd Respondents policy documents, prevailing strategic plan, Board Minutes and Management reports, examined pertinent financial, human resource, procurement and project management records and interviewed the Managing Director (Claimant), the Board Chairman, Heads of Department and key staff in relevant areas.
35. That the auditors further conducted physical inspection of the EPS factory.



36. The Report having made several findings, observations and recommendations, including the recommendation to relieve the Claimant of his services, the Respondent had a right to require the Claimant to respond to the issues raised in the report some of which were serious.
37. Section 43 of the [Employment Act](#) provides that the employer must prove the grounds for termination of employment and that those reasons must be what the employer believed at the time of termination. Proof of grounds for dismissal can however only be achieved by giving the employee an opportunity to defend himself.
38. In the instant case the Claimant did not respond to the 2nd Respondent's letters requiring him to show cause why disciplinary action should not be taken against him. I therefore find that although the Respondents had valid reason to subject the Claimant to disciplinary hearing, there was no proof of those grounds as the Claimant was never given the opportunity to attend a disciplinary hearing.

Whether the Respondent complied with fair proceeding

39. Section 41 of the [Employment Act](#) provides as follows:

41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

40. In the instant case the 2nd Respondent concluded that the Claimant had declined to subject himself to disciplinary process after receiving his letter dated 8th September, 2014 in which he informed the 2nd Respondent that because the matter was before both Parliament and the Industrial Court (Now Employment and Labour Relations Court) it would be prejudicial for him to issue a comprehensive response at that stage.

41. The Respondent thereafter never communicated with the Claimant any further until 2nd October, 2014 when he was issued with a letter of summary dismissal.

42. The letter from the Claimant is reproduced below:

TMM/2074/2014

NHC/CONF/PWN/NJU/1490/(29) SC

8th September 2014

The Board Chairman



National Housing Corporation
NHC House, Agakhan Walk
Nairobi
Attention: Mr. Sammy Chepkwony

Dear sir,

RE: Special Audit By The Inspectorate Of State Corporations

I refer to your letter dated 27th August 2014.

As you are aware, the special Audit report is also presently the subject of inquiry by a Parliamentary Committee where it has emerged that the report may have been unlawfully or irregularly altered.

Indeed, I am given to understand that the author of the report denied making the recommendation that led to my suspension.

The matter is also presently before the Industrial Court and it would thus be prejudicial to both processes for me to issue a comprehensive response at this stage.

I should nevertheless emphasize that I remain keen on an amicable and just resolution of the matter.

Yours faithfully,

Signed

Arch. Wachira Njuguna

Was the position taken by the 2nd Respondent correct?

43. The parties have not submitted to the court the disciplinary rules or procedure of the Respondent. There is also no record of the deliberations of the Respondent's Board to enlighten the court on what actually transpired therein. The Court therefore cannot tell the basis upon which the 2nd Respondent concluded that the Claimant had declined to subject himself to its disciplinary process.
44. Section 41 of the *Employment Act* is clear, that an employer must give an employee an opportunity to be heard. The kind of hearing envisaged is before some kind of panel which would ordinarily differ from one employer to another.
45. In the instant case there was a Board which considered the Claimant's case. At paragraph 16 of the 2nd Respondent's Amended Response to the Claim it pleads that:-

The Board of the 2nd Respondent in view of the Claimant's stated refusal to submit himself to the disciplinary process, it set in motion by its letter dated 04/08/2014 considered the Claimant's letters dated 30/07/2014, 06/08/2014 and 08/09/2014 and finally made the determination upon completion of its investigations that the Claimant had failed to carry out the duties, responsibilities and functions bestowed upon him as per his Letter of Appointment as Managing Director of the 2nd Respondent and resolved to summarily dismiss him from employment with effect from 02/10/2014.

46. This position was not correct because the 2nd Respondent was supposed to decide after receiving the Claimant's response to an invitation to attend the disciplinary hearing. The 2nd Respondent ought to have still invited the Claimant for a hearing and it is only if the Claimant failed to attend the hearing



that it should have made a presumption that he had refused and/or declined to subject himself to the disciplinary process.

47. For this reason the Respondent was unable to determine whether or not the Claimant had committed the misconduct he was accused of.
48. The foregoing being the case, I find that the 2nd Respondent failed to comply with fair procedure as provided under the [Employment Act](#). I find that the dismissal of the Claimant was therefore procedurally unfair.

Remedies

49. The Claimant testified during the hearing that he was paid Ksh. 152,243.90 as terminal dues.
50. Having found the termination unfair, the Claimant is entitled to pay in lieu of notice in line with the provisions of section 49(11) of the [Employment Act](#). I award him Ksh. 1,380,000 in lieu of notice in terms of his contract which provided for 3 months' notice. The Claimant is also entitled to gratuity for the period worked being 21 months
51. The Claimant is entitled to the salary withheld during suspension which I award him at Ksh. 520,000
52. I further award the Claimant Ksh. 100,000 as leave allowance for 2 years at Ksh. 50,000 per year as set out in his contract of service.
53. The Claimant is not entitled to the salary for the period not worked as there is no justification for the same.
54. I also decline to grant the Claimant compensation for unfair termination as he was partly to blame for his failure to respond to the show cause letter thus giving the 2nd Respondent the impression that he had declined to submit himself to disciplinary process.
55. The Claimant will have the costs of the suit.
56. Interest shall accrue from date of Judgment.

DATED SIGNED AND DELIVERED VIRTUALLY IN ELDORET THIS 5TH DAY OF OCTOBER 2023

M. ONYANGO

JUDGE

