



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 829 OF 2016**

**JAMES NGANGA MBUGUA.....CLAIMANT**

**VERSUS**

**KIAMBU WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The cause herein was commenced by way of a Memorandum of Claim dated 10<sup>th</sup> May, 2016 and through which the claimant has cited the respondent for; unfair and unlawful termination; unfair and unlawful decision to suspend him and advertise his position in the local dailies. Accordingly, he seeks various reliefs from the respondent including compensatory damages; unpaid airtime and entertainment allowance; and general damages.

2. The respondent opposed the claim but admitted that the claimant was appointed as its Managing Director and was suspended sometimes in 2015 to pave way for investigations. It further denied terminating the claimant's services and prayed that his claim be dismissed with costs.

3. The matter proceeded for part hearing on 26<sup>th</sup> February, 2020 and was adjourned to 12<sup>th</sup> May, 2020, but it failed to take off on the said date owing to absence by both parties. It was rescheduled for hearing once again on 29<sup>th</sup> September, 2021 when it proceeded partly and thereafter, on 8<sup>th</sup> November, 2021 when it was concluded following the hearing of the respondent's case.

**Claimant's case**

4. The claimant testified as CW1 and sought to adopt his witness statement constitute part of his evidence in chief. He also produced his bundle of documents as exhibits before court.

5. It was his testimony that he was appointed as the acting Managing Director (MD) of the respondent with effect from 7<sup>th</sup> December, 2009 and was later confirmed to the said position with effect from 26<sup>th</sup> November, 2010. That he was to serve as such under a contractual basis for a period of two years, but his terms of service were later converted from contractual to permanent and pensionable, following a board resolution to that effect.

6. He averred that vide a letter dated 6<sup>th</sup> July, 2015, he was asked to step aside on allegations that the respondent was experiencing problems hence necessitating investigations. That the said problems were not disclosed in the suspension letter. It was his testimony that out of his own initiative, he apprised the respondent board of his achievements vide a letter dated 25<sup>th</sup> October, 2015. That through a letter dated 5<sup>th</sup> October, 2015, his suspension was extended for a further one month with effect from 7<sup>th</sup> October, 2016 till 6<sup>th</sup> November, 2016. The claimant further stated that he was advised through the said letter that he would proceed for 27 days annual leave upon expiry of his suspension thus, his leave was to take effect from 7<sup>th</sup> November, 2015 till 15<sup>th</sup> December, 2015.

7. The claimant further stated that on 3<sup>rd</sup> November, 2015, he was served with a show cause letter through he was accused of gross misconduct. That he responded to the said show cause letter and appeared before the respondent's Board for an interview on 25<sup>th</sup> November, 2015, but was never informed of the outcome of the said interview. That his suspension was later extended until 11<sup>th</sup> January, 2016, then later to 11<sup>th</sup> February, 2016. That vide a letter dated 14<sup>th</sup> December, 2016, the respondent referred the claimant's case to the County Executive Committee (CEC) member, Water Environment and Natural Resources, Kiambu County Government for further action. That through the said letter, he was advised to await from the said county government. That nonetheless, he has never heard from the respondent nor Kiambu County Government and neither has he ever been served with a letter terminating his services. He admitted that to date, he continues drawing salary from the respondent.

## Respondent's case

8. The respondent tendered oral evidence through Mr. James Gitau Muriuki who testified as RW1. He identified himself as a Board member of the respondent. He asked the court to adopt his witness statement as part of his evidence in chief. He also produced the bundle of documents filed on behalf of the respondent as exhibits before court.

9. RW1 averred that the letter dated 24<sup>th</sup> May, 2016 executed by the claimant is not a termination letter. He also averred that the claimant was appointed as the respondent's MD and was sent on suspension following accountability issues. That the respondent's performance was on a decline and at some point, was unable to meet its financial obligations hence the Board resolved to send the claimant on suspension, so as to pave way for investigations. That the claimant's suspension was to avoid instances of interference with the investigations. He averred that the claimant was later issued with a show cause letter which detailed the allegations against him and which he tendered a response to. That in his response, the claimant shifted blame to his coworkers and failed to own up to his mistakes.

10. It was also the testimony of RW1 that the investigations revealed that the claimant was the reason behind the declining performance of the respondent. That the Board resolved to redeploy the claimant to the CEC member, Water Environment and Natural Resources, Kiambu County Government, given that water services is a devolved function, hence the respondent falls under the said county government. He denied that the claimant's prolonged suspension amounted to malice on part of the respondent.

## Submissions

11. Upon close of the hearing, both parties filed written submissions with the claimant submitting that the respondent had failed to discharge the burden of proof under section 47(5) of the Employment Act to justify his termination and in this instance, placed reliance on the cases of **Parliamentary Service Commission vs Christine Wambua (2018) eKLR** and **Wilson Mudogo Mulima vs Ags Worldwide Movers (K) Limited eKLR**. The claimant further submitted that the respondent breached his right to fair administrative action by pushing the investigation period thus subjecting him to mental anguish and anxiety. On this issue, he cited the case of **Margaret Ayuma vs Attorney General (2018) eKLR** and **Jacqueline M. Mutiso vs Kenya Revenue Authority (2021) eKLR**. It was also his submission that the respondent acted unlawfully and subjected him to public humiliation and mental anguish when it advertised his position in the local daily.

12. On its part, the respondent submitted that the claimant was not terminated and that he was seconded to Kiambu County Government. That the claimant never indicated that the employment terms under the county government would be less favourable. The respondent further submitted that the allowances claimed by the claimant were meant to facilitate his execution of official duty and since he was on suspension and not performing any duty, he was not entitled to the same.

## Analysis and Determination

13. Having considered the pleadings on record, the rival submissions, the documentary and oral evidence by both parties, the issues falling for the court's determination are;

- i. Was the claimant terminated from employment?
- ii. If the answer to (i) is in the affirmative, was his termination unfair and unlawful?
- iii. Whether the claimant was seconded to Kiambu County Government?
- iv. What reliefs if any, avail to the claimant?

### Was the claimant terminated from employment?

14. The claimant has alleged that the respondent unfairly and unlawfully terminated his services. This position has been disputed by the respondent who argues that it has continued to pay the claimant a monthly salary for the past 80 months.

15. The pertinent question therefore is, was the claimant terminated from employment or not?

16. The Blacks Law Dictionary, 10<sup>th</sup> Edition defines the term "Termination of Employment" as follows;

**"The complete severance of an employer-employee relationship."**

17. Further, **Section 47(5)** of the Employment Act (Act) places the burden of proving unfair termination of employment or wrongful dismissal on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal. The said provision is in the following terms;

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

18. The Court of Appeal reiterated this issue in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, and had this say;

**“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”**

19. In following with the above legal position, the provisions of **section 47(5)** and considering the definition of the term **“termination”**, the claimant was required to prove that there was complete severance of his employment relationship with the respondent and that the circumstances constituting the same were unfair.

20. The claimant did not produce a termination letter nor any communication to that effect from the respondent. Instead, he places reliance on the respondent’s conduct. Indeed, the claimant admitted that todate, he continues drawing a salary from the respondent.

21. If indeed, the respondent terminated the claimant’s employment, there would at least have been some form of correspondence to prove that fact. In absence of such evidence, it can only be inferred that there was no severance of the employment relationship from the respondent’s end.

22. Even if the claimant was to place reliance on the respondent’s conduct, nothing stopped him from claiming constructive dismissal and moving the court as appropriate.

23. The upshot of the foregoing is that the claimant has failed to prove that his services were indeed terminated. Having found as such, it is not necessary to consider whether the termination was unfair and unlawful, hence that issue falls by the wayside.

### **Whether the claimant was seconded to Kiambu county government?**

24. Having determined that the claimant was not terminated and noting that the disciplinary proceedings commenced against him were not logically concluded as well as the fact that his case was referred to the CEC member Water Environment and Natural Resources, Kiambu County Government, it is imperative to determine whether the claimant was effectively seconded to the Kiambu County Government.

25. The respondent has averred that it seconded the claimant to the Kiambu County Government following a board resolution of 14<sup>th</sup> December, 2016. I have noted that the letter dated 11<sup>th</sup> February, 2016, does not refer to “secondment”. The same reads in part as follows;

“The Board of Directors in their meeting held on 14<sup>th</sup> December, 2014, referred your case to the County Executive Committee Member for Water, Environment and Natural Resources, Kiambu County Government for further action. Kindly await further institutions from Kiambu County Government.”

26. If the respondent’s intention was to second the claimant to the County Government, nothing would have been easy as putting the same in black and white. In an employment relationship, secondment is not and cannot be implied, it has to be express. If anything, the said letter expressly advises the claimant to await further instruction from the County Government. It does not make any mention to the term “secondment”. In fact, and as it would come to pass, the County Government did not issue any instruction and/or direction to the claimant hence he was left in limbo.

27. It is also apparent that the respondent left the disciplinary process in abeyance or rather abandoned the same midstream. During the trial, it did not come out clearly from the respondent’s end, why it was not able to conclude the disciplinary process against the claimant. As the claimant’s employer, it had the prerogative to make a determination pertaining the ongoing disciplinary proceedings against the claimant given that he had been issued with a show cause letter which he had responded to and indeed, he had appeared before the Board for an interview, which I presume constituted an oral hearing. Instead, the respondent chose to hand over the process to another entity and left it at that. It is also notable that the court vide its orders of 28<sup>th</sup> September, 2016, allowed the respondent to conclude the disciplinary process against the claimant within 30 days thereof. The respondent cannot therefore say that its hands were tied. It just opted to abandon the disciplinary process altogether.

28. In as much as the respondent operates under the Kiambu County Government, nothing stopped it from concluding the disciplinary process. In any event, RW1 stated before court that the CEC member, Water Environment and Natural Resources sits in its board. Therefore, the County Government would be part and parcel of any determination by the board.

29. The upshot of the foregoing is that the claimant still remained an employee of the respondent for all intents and purposes and his purported “secondment” was not effective at all.

### **Reliefs**

30. Having found that the claimant’s employment was not terminated at all, the prayer for compensatory damages falls.

31. As regards, the prayer for airtime and entertainment allowances, the court would be inclined to agree with the respondent that the same are facilitative in nature. Essentially, such allowances are normally given so as to aid an employee in the performance of his or her duties. In this case, the claimant was not performing any duty for the entire period he was on suspension, hence he is not entitled to the said allowances as sought. This determination is reinforced by the Court of Appeal’s finding in the case of **Richard Erskine Leakey & 2 others vs Samson Kipkoeh Chemai [2019] eKLR**, where it was stated thus:

**“55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment.**

**When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”**

**Orders**

32. Having found that the claimant was not terminated and his purported “secondment” was ineffective, the only logical determination is to lift the suspension and direct that he resumes duty in his previous capacity.

33. The court also finds that the prolonged suspension of the claimant was unfair and unlawful. However, the court will not award any damages in that regard, given that the claimant was on full salary during the period he was on suspension.

34. In view of the existing employment relationship between the parties, each party will bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY, 2022**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Olewe

For the Respondent Ms. Chepng’etich

Court Assistant Barille Sora

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**