



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 31 OF 2020

RAYMOND JACOB OTIENO.....CLAIMANT

v

WEST KENYA SUGAR CO LTD.....1st RESPONDENT

MENENGAI OIL REFINERIES LTD.....2nd RESPONDENT

SUKARI INDUSTRIES LTD.....3rd RESPONDENT

JUDGMENT

1. On or around 16 January 2016, West Kenya Sugar Co Ltd (West Sugar) offered Raymond Jacob Otiemo (the Claimant) the position of Group Development Manager at a gross salary of Kshs 349,132/-.
2. Menengai Oil Refineries Ltd (Menengai) also offered the Claimant the position of Group Development Manager through a letter dated 18 January 2016. The pay was set at Kshs 150,000/-.
3. The next day, 19 January 2016, Sukari Industries Ltd (Sukari Industries) offered the Claimant the position of Group Development Manager at a consideration of Kshs 100,000- per month.
4. On 9 September 2019, West Sugar requested the Claimant to transfer certain domains from his personal email account to that of West Sugar.
5. On 10 September 2019, the Claimant sent an email to the Managing Director of West Sugar, tendering his resignation.
6. The email indicated that the resignation was at the bidding of the Managing Director. The Claimant also gave three proposals for a soft landing.
7. West Sugar did not respond, and the Claimant sent a reminder on 18 September 2019.
8. The Claimant was thereafter locked out of the official email, and he sent a complaint to West Sugar on 23 September 2019.
9. When the Claimant did not get a response to his resignation notice, he sent an email dated 24 September 2019, withdrawing the resignation. He applied for leave instead and also sought clarification on the blocking of his official email address.
10. West Sugar replied on the same day, indicating that emails of employees who leave are suspended. The Claimant was asked to give an update on the transfer of the domain name.
11. On 25 September 2019, the Claimant responded to the email, denying that he had ceased working for West Sugar.
12. What followed was a letter dated 26 September 2019 informing the Claimant that he had been suspended from work for 30-days.
13. The reason given for the suspension was that the Claimant had neglected his duties, improper work performance and carelessness. The suspension was to facilitate investigations into the allegations. The Claimant was directed to hand over official properties in his possession.
14. The Claimant was also alerted to possible disciplinary action.

15. West Sugar issued a show-cause to the Claimant on 7 October 2019, setting out some 14 allegations. The Claimant was instructed to respond before 11 October 2019.
16. Upon receipt of the show-cause, the Claimant requested to be allowed access to his official email account, more time and furnishing of evidence before responding to the show-cause.
17. The Claimant responded to the show-cause on 12 October 2019. He noted that his requests had not been met.
18. On 24 October 2019, West Sugar invited the Claimant to attend a disciplinary hearing on 5 November 2019.
19. In a reply dated 30 October 2019, the Claimant indicated he would attend with five witnesses but regretted that the records/information he sought had not been supplied to him. He also intimated that he required to cross-examine certain witnesses.
20. West Sugar notified the Claimant on 31 October 2019 that it had no documents to supply and that all the information was within his knowledge.
21. The Claimant sent an email to West Sugar on the morning of the hearing expressing the view that it would release the witnesses he had requested to attend.
22. The hearing proceeded, and on 9 November 2019, the Claimant requested for minutes of the hearing. He also noted that his suspension had lapsed.
23. West Sugar then summoned the Claimant for another hearing on 14 November 2019, and the next day, he received an email informing him of the termination of his contract. Three reasons were given for the decision.
24. The Claimant appealed against the decision on 27 November 2019.
25. On a date that is not clear, the Claimant filed a Petition before the Court in Nairobi alleging breach of contract and violation of his rights. The Petition was withdrawn around 6 March 2020, and this Cause was filed on 8 May 2020.
26. The Respondents filed a joint Response on 31 August 2020 (it was pleaded that the Respondents were family companies). The Respondents raised a Counterclaim against the Claimant.
27. The Claimant responded to the Counterclaim, and the Respondents filed a reply on 17 March 2021.
28. The Cause was heard on 22 November 2021 and 25 January 2022.
29. The Claimant and the Respondents' Group Human Resources Manager and Group Corporate Affairs Manager testified.
30. The Claimant filed his submissions on 22 February 2022, while the Respondents filed their submissions on 17 March 2022.
31. The Court has considered the pleadings, evidence, and submissions and has adopted the Issues as outlined by the parties.

Joint or distinct employment contracts

32. The Claimant had three separate contracts with the three Respondents. Each contract had different terms and conditions of service, including remuneration.
33. The Claimant produced in Court copies of payslips from West Sugar and Menengai.
34. Under company law, a company is a juristic person with a distinct legal existence.
35. In consideration of the separate contracts and remuneration paid by each of the Respondents, and despite the assertion that the Respondents were family businesses sharing directorships and that under company law, a company has a distinct legal or juristic personality, the Court finds that the Claimant had individual/separate contracts with each of the Respondents.

Unfair termination of employment

Procedural fairness

36. Section 35(1)(c) of the Employment Act, 2007 requires the employer to issue a written notice of termination of employment.
37. Section 41 of the Act, on its part, obligates the employer to grant the employee an opportunity to make representations before deciding to terminate the employment contract.
38. Menengai and Sukari Industries did not issue any written notice of intention to the Claimant that there was an intention to terminate the

contracts.

39. The Court, therefore, finds that the determination of the two contracts were procedurally unfair.

40. West Sugar issued a show-cause to the Claimant and set out the allegations he was to meet. The Claimant was then invited to a disciplinary hearing.

41. Before the hearing, the Claimant requested for certain records. West Sugar did not provide the records. It insisted that the Claimant had the information in the records.

42. The three reasons which led to the summary dismissal of the Claimant were in brief:

fraudulently authorised twenty (20) 450 kg bags of DAP fertiliser valued at Kshs 65,000/- being company property from the company stores; without authorisation from your seniors, you misused your position as Head of Department and diverted seed cane valued at Kshs 127,528/- which was meant for use at Kabras region to your private farm in Naitiri Bungoma and through negligence, causing loss of Kshs 8,600,000/- revenue by failing to put in place control measures.

43. The nature of the allegations against the Claimant required investigations to be conducted. West Sugar had suspended the Claimant to facilitate investigations.

44. It cannot be that West Sugar did not have policies and procedures in place regarding the removal of items, including fertiliser, from the stores. The removal of the fertiliser must have left an audit trail. Otherwise, West sugar could not have detected that fertiliser had been removed without authorisation.

45. Similarly, West Sugar could not have established how seed cane worth Kshs 127,528/- was diverted nor concluded that there was a revenue loss of Kshs 8,600,000/-.

46. There must have been primary records that led West Sugar to lay or support the allegations against the Claimant. If the records were confidential, the investigation report should have been provided to the Claimant.

47. West Sugar did not provide the records to the Claimant, nor did it place the documents before the Court. The records constituted the best evidence in the arsenal of West Sugar.

48. By failing to provide the records to the Claimant, West Sugar did not afford the Claimant sufficient facilities to defend himself.

49. The Court concludes that West Sugar failed the procedural fairness test.

Substantive fairness

50. Sections 43 and 45 of the Employment Act, 2007 place a burden on an employer not only to prove the reasons for dismissing an employee but to also prove that the reasons were valid and fair.

51. In an endeavour to discharge the burden, the Respondents called two witnesses. The Court will examine the evidence presented by the witnesses to discharge the burden regarding the allegations against the Claimant.

Fraudulent collection of 20 bags of DAP fertiliser

52. The witnesses referred to an audit report No. 2019 – F01 for the period April 2019 to July 2019. The audit report noted that 20 bags of DAP fertiliser had been taken to the Claimant's farm, but no debit note had been issued, and thus, the Claimant was to be debited.

53. The show-cause notice dated 7 October 2019 did not have this allegation. During oral evidence, no testimony was led that the Claimant was responsible for issuing debit notes.

54. The Court finds that the Respondents did not prove this allegation.

Diversion of seed cane valued at Kshs 127,528/-

55. The audit report did not address the allegations of cane diversion.

56. The seed cane allegation was mentioned in an investigatory statement by one Kutima (who had allegedly been assigned duties by the Claimant) and the Head of Cane Development, one Kangwana.

57. The said Kutima and Kangwana, who implicated the Claimant, were not called to testify in Court for their statement(s) to be tested or interrogated.

58. The Court also notes that Kangwana appeared as part of the Disciplinary Panel but was not cross-examined by the Claimant.

59. Despite requesting that Kutima be called as a witness before the Disciplinary Panel, he was not presented.

60. The Respondents did not prove the validity or fairness of this allegation.

Loss of Kshs 8,600,000/-

61. The last reason the Respondents were expected to prove was that there was the loss of Kshs 8,600,000/- occasioned by the Claimant's negligence.

62. The audit report did not mention the question of the loss.

63. In the show-cause, it was alleged that the failure by the Claimant to put in place control measures led to the loss of Kshs 8,600,000/-.

64. The Claimant had, in his response, stated that cane harvesting was not solely within his or the Respondents' control and that the farmers were always pre-called by customer care.

65. The Respondents did not place before the Court any evidence to support the allegation that the Claimant was responsible for the loss of Kshs 8,600,000/- or that there was such a loss.

66. In their very detailed witness statements, the Respondent's witnesses were merely content to refer to the Claimant's response to the show.

67. Without any evidential foundation to this allegation, the Court can only conclude that this was also not a valid or fair reason to dismiss the Claimant.

68. The Claimant served each of the Respondents for about 3-years. In consideration of the length of service, the Court is of the view that the equivalent of 3-months gross wages against each Respondent would be appropriate (gross wages were Kshs 564,336/-, Kshs 208,246/- and Kshs 100,000/- respectively).

69. The Court will also allow the equivalent of 1-month basic salary apiece as pay in lieu of notice.

Counterclaim

70. The Counterclaim for Kshs 8,600,000/- was (a) special damage that the Respondents expected to prove strictly.

71. The Respondents failed to meet the threshold of proving this head of the claim, and it is for dismissal.

Conclusion and Orders

72. The Court finds and declares:

(i) The Claimant had separate contracts with each of the Respondents.

(ii) The summary dismissal of the Claimant was unfair.

73. The Counterclaim is found without merit and is dismissed without an order on costs.

74. The Claimant is awarded globally:

(i) Compensation Kshs 2,617,746/-

(ii) Pay in lieu of notice Kshs 771,812/-

TOTAL Kshs 3,389,558/-

75. The Respondents to each issue a certificate of service to the Claimant within 21-days.

76. The Claimant to have interest on the decretal sum from the date of judgment and costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF APRIL 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Bruce Odeny & co. advocates

For Respondents O & M Law LLP Advocates

Court Assistant Chrispo Aura