



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.1 OF 2019

(Before D.K.N.Marete)

GEORGE KARANJA NGUNDA.....CLAIMANT

VERSUS

MERU WATER AND SEWERAGE SERVICES

(MEWASS) REGISTERED TRUSTEES.....1ST RESPONDENT

MERU COUNTY URBAN WATER AND SANITATION

SERVICES CORPORATION.....2ND RESPONDENT

JOSEPH K.MBERIA.....3RD RESPONDENT

MERU COUNTY GOVERNMENT.....4TH RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Claim dated 10th January, 2019 and filed on 17th instant. It does not disclose the issue in dispute on its face.

The Respondents in a joint response in the memorandum of claim dated 8th February, 2019 deny the claim and pray that the same be dismissed with costs to themselves.

The Claimant's case is that at all material times to this suit, he was employed by the 1st Respondent as a General Manager, of Meru Water and Sewerage Services (MEWASS) Registered Trustees from 1st December 2016 until 31st August, 2018 when he was unlawfully and unfairly dismissed from work.

The Claimant's further case is that he was offered a three year renewable contract at a monthly salary of Ksh.214,817.00 and this was with effect from 1st December 2016 to 30th November, 2019, the close of his first term of contract. In any event, at such close of his contract, this was renewable based on performance and his willingness to continue in service.

It is the Claimant's other case that in his tenure as General Manager, he steered the organisation to stellar growth and received accolades and bonuses for improving Meru Water and Sewerage Services.

The Claimant's further case is that around the year 2014, the County Assembly of Meru enacted the Meru County Water and Sanitation Services Act, 2014 which established a new corporation, known as the Meru County Urban Water and Sanitation Services Corporation. The new establishment was designated to be a successor to Meru Water and Sanitation Services Company and Imenti and Tharaka Nithi Water and Sanitation Services Company.

His further case is that on 30th August, 2018, the board of the 2nd Respondent passed a resolution to terminate his employment.

Pursuant to the resolution and in utter disregard of the law, the 3rd Respondent herein issued a letter dated 31st August, 2018, purporting to immediately terminate the Claimants employment from the position of General Manager of the 1st Respondent. On enquiry of this anomaly the 4th Respondent, in a letter dated 21st September, 2018 answered that the Claimant was employed by a body not existent in law.

He avers that his termination from employment was unfair and unlawful and grossly violated his legitimate expectations in a contract of service. He prays as follows;

- a) *One month salary in lieu of Notice shs.240,803*
 - b) *Salary for the remainder term of the contract shs.3,704,030*
 - c) *Pension payable for remainder of the contract term shs.453,525*
 - d) *88 days leave not taken shs.706,356*
 - e) *Telephone allowance payable for remainder of the contract term shs.37,500*
 - f) *Annual staff retreat allowances shs.32,500*
 - g) *Christmas shopping voucher for 2018 shs.8,000*
 - h) *Annual WASCA games allowances shs.32,000*
 - i) *13th month basic salary for the year 2018 shs.211,578*
 - j) *End of year 2018 staff party shs.5,000*
 - k) *Compensation for unlawful and unfair termination shs.2,889,636*
- Total shs. 8,320,928**

He claims as follows;

- a) *A declaration that the termination of the Claimant employment was unlawful.*
- b) *Terminal dues in sum of shs.8,320,928*
- c) *Medical cover for the remainder of the contract term*
- d) *Personal Accident Cover for the remainder of the contract term*
- e) *Annual membership to Meru Sports Club for the remainder of the term*
- f) *The Respondent to issue the Claimant with a certificate of Service*
- g) *Costs and Interest*
- h) *Any other relief as the court deems fit.*

The Respondents' case is one of denial of the claim.

It is their case that the appointment of the Claimant on 1st December, 2016 was unlawful and unprocedural in that the 1st Respondent had ceased to exist on 11th December, 2014 when the Meru County Water and Sanitation Services Act, 2014 commenced operation.

It is their further case that the Claimant's employment had become untenable by virtue of operation of law in view of The Meru County Water and Sanitation Services Act, 2014 which had abolished the Claimant's office.

Again, the Respondents state that The Meru County Water and Sanitation Services Act, 2014 established a new corporate body, the 2nd Respondent who effectively took over the services previously offered by the 1st Respondent in the County of Meru.

Further, the Respondents deny the contents of paragraph 20 of the Memorandum of claim and put the claimant to strict proof thereof. The Respondents state that by virtue of their letters dated 21st September and 19th November, 2018 the Claimant was invited for a calculation and eventual payment of his dues but he elected to stay away and has never cleared with the Human Resource Department.

They therefore call and pray that the claim is dismissed with costs.

The matter came for hearing on 4th March, 2020 when the parties testified in support of the respective cases.

The issues arising for determination therefore are;

1. What is the import of the outcome of the application dated 4th December, 2020 on this matter?
2. Is this a clean and clear case of redundancy?
3. Was the termination of the employment of the Claimant unfair, unlawful and unprocedural?
4. Is the Claimant entitled to the relief sought?
5. Who bears the costs of this cause?

The 1st issue for determination is the import of the outcome of the application dated 4th December, 2020 on this matter.

This application *inter alia* sought a review and setting aside of the Judgment dated 11th November, 2020 together with all further consequential orders therein. The application was not contested and was compromised by the parties at the hearing on 2nd February, 2021, paving way for the activity we are now engaged in.

What is a review? Setting aside? To me, a review is a revision of material with a view to remedying any anomalous subject matter therein contained. It is unfortunate that we are not able to define this term without using her sister terminology. However, this suffice for now.

Setting aside would mean a removal or side line of whatever is available in place for other replacement.

The concise Oxford English Dictionary, 12th Edition, edited by Angus Stevenson and Maurice Waite, Oxford University press at page 1232 defines review, revise and revision as;

“Review...a formal assessment of something with the intention of instituting change if necessary...a critical appraisal...”

“Revise ...examine and improve or amend (written or printed matter). Reconsider and alter in the light further evidence...”

“Revisionan action of revising”

Setting aside is not set out here.

The concise Black’s Law Dictionary, 10th Edition, edited by Bryan A.Garner page 1514 and 1515 defines review and revision as;

“Review...consideration, inspection, or re-examination of a subject or thing...”

“Revisiona re-examination or careful review for correction or improvement...”

Further, set aside comes out thus;

“Set aside...vb. (18c) (Of a court) to annul or vacate (a judgment, order, etc.) ...”

Setting aside would, to me, therefore mean putting or standing something out of the way.

In this scenario, the authority of the orders in the application allows this court to review, revise and or set aside the judgment of court dated 11th November, 2020. This would therefore entail a revision or even total overhaul of the entire judgment as set out and delivered by court.

This being the position, this court moves on to appropriately deal with the situation at hand. It also marks an answer to issue number 1 above.

The 2nd issue for determination is whether this is a clean and clear case of redundancy. The Respondent’s case and submission is that the termination of the employment of the claimant was legitimate in the sense that his contract of service was entered into with a party whose existence had ceased with the enactment and commencement of the Meru County Water and Sanitation Services Act, 2014 whereby the 1st Respondent ceased to exist. Then, the continued employment of the claimant became untenable as the Act abolished his office.

This case of the Respondent now begs the question: was this a case of redundancy and if so, were the provisions of Section 40 of the Employment Act, 2007 pursued in terminating the employment of the Claimant.

The Claimant was in service for the better part of his contract of service during the operation of the Act that occasioned changes in the management of the organisation the new found evidence of non-existence of the Claimant’s employer by efluxion of the law therefore comes out as an excuse, not the reason for his termination of employment.

Section 40 of the Employment Act, 2007 provides thus;

40(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;

a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) ...

There is no evidence whatsoever that the procedure prescribed by Section 40, above was pursued. Neither party has tendered any evidence to this extent. In the absence of a demonstration of a case for redundancy and the application of Section 40 above in the management of such a case of redundancy, this court is left with no option but to deem the termination of the employment of the claimant anomalous, unprocedural, unfair and unlawful.

The 3rd issue for determination is whether the termination of the employment of the Claimant was unfair, unprocedural and unlawful. The claimant in his written submission dated 29th July, 2020 reiterates the case of unlawful termination of employment in the synopsis at page 2 of the said submissions which comes out as follows;

I. Brief facts of the dispute are that the 1st Respondent on or about 21st November, 2018 offered the claimant an employment contract for **3 years (36 months)** as **General Manager** at a starting monthly Gross salary of **Kshs.214,817** which was increased from time to time until it reached **Kshs.240,803** as at the month of August 2018.

II. The Claimant worked for the 1st Respondent with due diligence and faithfulness until on or about 31st August 2018 when the Respondent unlawfully and unfairly terminated his contract without any explanation or legal justification **15 months** before its completion.

III. The same was effected without any color of right or sufficient notice to the Claimants or any means to show cause why his employment contract should not been dispensed with contrary to the provisions of Section 41 of the Employment Act, 2007.

IV. The Claimant was not given a chance for fair hearing by the respondent and neither was he given an alternative position or solution as provided for in section 45 and 45 of the Employment Act 2007 respectively.

V. The Respondent did not pay the claimant his terminal dues.

The Claimant further submits that his employment was terminated vide a letter dated 31st August, 2018 authored by the 3rd Respondent in an attempt to effect resolutions of the 2nd and 4th Respondents in pursuant of their mandate to hand over the roles of the 1st Respondent. This comes out thus;

The Respondent stated that he is the 2nd Respondent's (Meru County Urban Water and sanitation Services Corporation) Chief Executive Officer. He also testified that he was the author of the letter dated 31st August, 2018 terminating the claimant's contract following a resolution of the board which is constituted by the 2nd and the 4th Respondents to handover the roles of the 1st Respondent to the 2nd Respondent and terminating the Claimant's contract forthwith.

He further testified that the decision was premised on the fact that the Meru County Water and Sanitation Services Act 2014 had created a new corporate body, the 2nd Respondent who effectively took over the services previously offered by the 1st Respondent.

His further case and submission is as follows;

*Furthermore, due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the **audi alteram partem** rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. Courts have deliberated on the issue of due process and the part it plays in determining whether termination is unlawful as was in **Civil Appeal No.293 of 2015; Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (k)** where court appreciated the case of **Samsung Electronics East Africa Ltd vs. K.M (2017) eKLR** and stated that;*

It is right that is delineated under section 41 of the Employment Act which stipulates:-

“41

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).” Emphasis added.

The Claimant further sought to rely on the authority of Kenya **Union of Commercial Food and Allied Workers v Meru North Farmer Sacco Limited, (2013) eKLR**, where the court observed as follows;

“...whatever reason or reasons that arise to cause an employer to terminate the services of an employee, must be taken through the mandatory process as outlined under section 41 of the Employment Act, 2007. That applies in a case for termination as well as in a case that warrants summary dismissal...”

Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s services but the employer does it in a procedure that does not confirm with the provisions of a statute, that still amounts to unfair termination...”

Again, it is the Claimant’s case and submission that due procedure pertaining termination of employment and in accordance to section 41 of the Employment Act, 2007 was not adhered to by the Respondent for the following reasons;

a) Section 35 of the Employment Act, 2007 was completely disregarded as no sufficient notice was accorded to the Claimant prior to the termination.

b) The Respondents failed to consider and involve the Claimant in the termination process by ignoring and neglecting to provide fair hearing where the Claimant would have explored less punitive measures of termination and ultimately share a possibility of absorption/reassignment to the new corporation (2nd Respondent) that was more or less taking up the roles of the 2st Respondent which measures in such peculiar circumstances are provided for under section 49 of the Employment Act, 2007.

c) The Claimant had a clean employment record with the Respondent and therefore the failure to call him for a proper hearing before deciding to terminate his services was unfair and uncalled for.

d) Failure to offer less punitive and or vindictive measures were an affront to the provisions of section 49 of the Employment Act, 2007.

e) Section 41 cited above makes provision for procedural fairness and any breach of the mandatory provisions of the Section makes the termination unfair as above stated.

Section 41 of the Employment Act, 2007 comes out thus;

41 (1) “... Sections 43(1) and 47(5) of the Employment Act must be construed so as not nullify the conventional and accepted law on the burden of proof... the plaintiff must adduce prima facie evidence that tends to show that his employer did not follow a fair procedure in terminating his employment. Once the claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the claimant is said to have proved his case on a balance of probabilities...”

41(2) ...

The Claimant further sought to rely on the authority of Kenya **Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited, (2013) eKLR**, where the court held thus;

“...whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act, 2007. That applies in a case for termination as well as in a case that warrants summary dismissal...”

Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s services but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination...”

The Respondents deny this. It is their case and submission that the termination of employment was lawful, valid and justifiable on the basis of the dissolution of the 1st Respondent to pave way for the 2nd. The 1st Respondent having been moribund, a continuous sustenance of the Claimant as such Chief Executive Officer was not sustainable and hence the termination of employment.

The Respondent in furtherance of her case submitted in reliance on the authority of **Justus Mukulu Muasaya v. Wells Fargo Limited (2018) eKLR**, where the court held as follows;

“The Respondent having provided the reason for termination and that fair procedure was followed, I find and hold that the termination was fair within the meaning of Section 45 of the Act”

She further justified the termination of the Employment of the claimant by relying on section 45 (2) (b) (ii) of the Employment Act, 2007 which justifies termination based on in the operation requirements of the employer.

The scenario and sequence of events in this cause point out to a case in favour of the Claimant. There is overwhelming evidence of a case of unlawful termination of employment. Firstly, the 1st Respondent did not give any reasons for termination of employment vide her letter of 31st August, 2018 and this is a breach of section 43 of the Employment Act, 2007 which provides for proof of reason for termination. This inaction invalidates and illegitimacies the termination of employment.

Secondly, the termination of employment failed the test of substantive and procedural fairness as enunciated under section 41 of the Employment Act, 2007 which stipulates that an employee is informed of any wrong doing in a language that he understands and before another employee, the reasons for which termination is contemplated. A disciplinary hearing of the case of the employee is mandatory and in such absence, the termination of employment becomes unlawful for all intents and purposes.

Earlier, it was noted that even in the event of redundancy as pleaded and submitted by the Respondent, no steps were taken to comply with the law on redundancy under section 40 of the Employment Act, 2007.

Further, the evidence of RW1-Joseph K.Mberia, the Chief Executive Officer of the new outfit was *inter alia*, captured as follows;

“He also indicated that following the establishment of the new corporation, the 2nd Respondent had an average of one hundred and two (102) employees of the 1st Respondents out of one hundred and five (105) absorbed/reassigned into the 2nd Respondents Corporation and hence it was only the Claimant and two others whose contracts were terminated.”

Moreover, the claimant’s three year conduct of service was incepted on 1st December, 2016 and would have ended on 30th November, 2019, all during the life of the Meru County Water and Sanitation Service Act, 2014. Why then would the respondents use the same law to terminate the contract of service midway? Your guess is as good as mine.

Where does this lead us to? This leads to a conclusion of a case of unlawful termination of employment where cessation of the existence of the Claimants employer only comes as an excuse. Why were the other one hundred and two (102) employees not shown the door? The guess is anybody’s. I therefore find and hold a case of unlawful termination of employment in the circumstances. And this answers the 3rd issue for determination.

The 4th issue for determination is whether the Claimant is entitled to the relief sought. He is. Having established and won a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i) That a declaration be and hereby issued that the termination of the Claimant’s employment was unfair, unprocedural and unlawful.
- ii) That the Claimant be and is hereby awarded 12 months compensation for unlawful termination of employment- Kshs.240,803.00
X 12 months=Kshs.2,889,636.00
- iii) That the Respondent be and is hereby ordered to issue a Certificate of Service to the Claimant in fourteen (14) days from today’s date.
- iv) The cost of this claim shall be borne by the Respondents.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Kiai holding brief for Kabathi instructed by Kabathi & Company, Advocates for the Claimant.
2. Mr.Bogire holding brief for Kibanga instructed by Muunga Kibanga & Company, Advocates for the Respondent.