



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.37 OF 2019

(Before D.K.N.Marete)

NJOKA MUTURI GATHIMBA.....CLAIMANT

VERSUS

KIRINYAGA WATER AND SANITATION COMPANY.....RESPONDENT

JUDGMENT

This matter was originated by way of a Claimant’s Memorandum of Claim dated 20th December, 2019. The issue in dispute is herein cited as;

Wrongful and unfair termination of the Claimant’s services and failure by the Respondent to pay terminal benefits to the Claimant

The Respondent in a Statement of Defence dated 31st January, 2020 denies the claim and prays that the same be dismissed with costs to herself.

That Claimant’s case is that on or about February, 2015 to 30th September, 2018 he was employed by the Respondent as Managing Director at a salary of Kshs.173,000.00 per month. This was raised to Kshs.200,000.00 on 1st October, 2016.

The Claimant’s further case is that from February, 2017 to 30th September, 2018, the Respondent deducted Kshs.27,000.000 from his pay without cause.

The Claimant’s other case is that on or about 5th December, 2016, he took out a loan of Kshs.3,000,000.00 with Barclays Bank Limited with a view to employment on his pay but when he resumed work from annual leave the respondent had filled his office. On 8th August, 2018, his services were terminated and thereby a disability to order the loan repayment. This is as follows;

- 10. *On or about 3rd May 2018, the Claimant developed health complications as a result of loss of earnings.*
- 11. *On or about 30th September 2019, the Claimant found out that he had been blacklisted by the Credit Reference Bureau Africa Limited.*
- 12. *The Claimant avers that this has limited his chance of getting employment elsewhere.*
- 13. *The Claimant commenced employment on or about 1st October 2015 as aforesaid and served the Respondent with loyalty and diligence until 9th August 2018 when the Respondent wrongfully and unlawfully terminated the services of the Claimant and failed to pay his terminal dues as tabulated herein below;*
 - a) *Three month’s salary in lieu of notice*
(200,000 x 3 months).....Ksh.600,000.00
 - b) *Monies deducted from recovered laptop.....Ksh. 88,000.00*
 - c) *Underpayment*

February 2017-September 2018

(27,000 x 20 months).....Ksh.540,000.00

d) Telephone allowance for 17 months

May 2017- September 2018

(12,000 x 17 months).....Ksh.204,000.00

e) Mileage allowance for 17 months

May 2017-September 2018

(78,491 x 17 months).....Ksh.1,334,347.00

f) Compensation for unfair termination

(200,000 x 12 months).....Ksh.2,400,000.00

TOTAL Ksh.5,166,347.00

The Claimant submits thus;

- a) He was employed by the Respondent on or about 1st October 2015 through a written contract.
- b) He served the Respondent with loyalty and diligence until 9th August 2018 when the Respondent unfairly terminated his services without due process of the law.
- c) The Claimant repeats the foregoing and state that the employer, the Respondent, acted in contravention of Section 41 where it is expected before termination the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee can understand, the reason for which the employer is considering termination and the employee is entitled to have another employee or a shop floor union representative of his choice present during this explanation. This section continues to state that (2) Notwithstanding any other provision of this part, The Employment Act, 2007 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.

He prays as follows

1. The sum of Kshs.5,166,347.00 as particularized in paragraph 13 and 14 of the claim respectively.
2. Cost of this suit.
3. Interest in (i) and (ii) above.
4. Quantum of damages for pain and suffering.
5. Any other relief as the court may deem fit.

The Respondent's case is a denial of the claim.

The Respondent's case is that it was the mandate of the respondent's Board of Director to review the claimant's salary subject to satisfactory performance but this was not done as is alleged by the claimant.

The Respondent's other case is that while the claimant was on annual leave, there was an emergency takeover of operations of the respondent by Tana Water Services Board pursuant to section 53 (2) of the Water Act 202 and clause 19 of the service provision Agreement between Tana Water Services Board and herself. This was due to concerns of unplanned and unexplained water shortages which adversely affected the public health of the residents occasioned by frequent staff unrest.

The Respondents other case is that during the period of emergency take over a competent core management team and board of directors were put in place but the claimant continued to be remunerated by the respondent for the balance of the contract term. He was at the end of the day issued with a three months' notice of contract non renewal under clause 25 of the contract of employment.

She therefore denies liability as claimed due to the circumstances of the parties to the contract of employment.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 12th February, 2021 submits a case of unlawful termination of employment. On this he seeks to rely on the authority of section 41 (1) and (2) of the Employment Act, 2007 provides thus;

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.

He buttress this by relying on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court observed thus;

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair.

She further reinforces her case by relying on Section 43(1) of the Employment Act, 2007 which requires that in any claim arising out of termination of a contract, the employer must 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.

She therefore sums her case as follows;

The termination of the employment of the claimant was unfair, wrongful and unlawfully land contrary to section 41 of the Employment Act, 2007 as the claimant was not given notice and was not afforded his right of being heard.

Again, the claimant relies on the doctrine of privity at length in **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another (2015) eKLR**. The Court of Appeal rendered itself as under;

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party.

Thus in AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.

The Respondents in her written submissions dated 22nd February, 2021 submits a case of no liability on the claim. This is as follows;

As per the Claimant's document No.27, upon an inspection being conducted by Water Services Regulatory Board, (WASREB), there was an emergency takeover of the operations and supplies of the Respondent by Tana Water Service Board, pursuant to the provisions of section 53 (2) of the Water Act, 2002 and clause 19 of the Service provision Agreement between Tana Water Services Board (TWSB) and the Respondent. The emergency takeover was due to concerns on the adverse effects of:

1. *Unplanned and unexplained water shortages in most of the service area which adversely affects the public health of the residents of the area caused by staff unrest.*
2. *The need to ensure the safety of the infrastructure which is currently vested and held by Tana Water Services Board and which is due to the frequent staff unrest cannot be guaranteed.*

3. Ensuring the county government which has the constitutional mandate to provide safe and adequate water services in its area as per the values and principles of governance in Article 10 of the Constitution of Kenya, 2010 is facilitated to do so as per the law. The decision has been taken in concurrence with the County Government of Kirinyaga as per the provisions of Article 189 of the Constitution.

It is her further submission that on 30th June, 2018 the Respondent issued the claimant with a three (3) months' notice of contract service termination. He was remunerated for all the contract period and the contract expired by effluxion of time and therefore no claim arises in the circumstances. Sections 41 and 43 of the Employment Act, 2007 do not also apply.

I agree.

The circumstances of this case dictates a case of no application of sections 41 and 43 of the Employment Act, 2007. The respondents who was no longer in charge of the management of the organisation at the time of the expiry of the contract of service of the claimant. The claimant had been served with a notice of termination of contract. A case of lawful termination of employment therefore ensues and I find as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the reliefs sought.

I am therefore entitled to dismiss the claim with orders that parties bear their costs of the same.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Shichangi instructed by Khamati Githinji Ashiruma & Chege Advocates for the Claimant.
2. Mr. Magua instructed by Magua and Mbatha Advocates for the Respondent.