



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1336 OF 2014**

**BETWEEN**

**JANET PISOI KIKAYAYA.....CLAIMANT**

**VERSUS**

**1. LOCAL AUTHORITIES PROVIDENT FUND BOARD**

**2. DAVID KOROSS .....RESPONDENTS**

**RULING**

1. The Claimant seeks, through her Statement of Claim, amended on 21<sup>st</sup> July 2015, Judgment against the Respondents, jointly and severally, in the following terms: -
  - a. Declaration that termination of the Claimant's contract of employment was unfair and unlawful.
  - b. 12 months' salary in compensation for unfair termination.
  - c. 7 months' salary under the 50-year retirement rule.
  - d. Costs, interest and any other suitable order.
2. The Amended Statement of Claim describes the 1<sup>st</sup> Respondent as a Body Corporate, established by an Act of Parliament, Cap 272 the Laws of Kenya.
3. The 2<sup>nd</sup> Respondent is described as the Chief Executive Officer of the 1<sup>st</sup> Respondent, at the time the Claimant's contract was terminated.
4. The Respondents filed an Application dated 25<sup>th</sup> February 2021, seeking an order that, the 2<sup>nd</sup> Respondent is discharged from the proceedings.
5. The Application is anchored on 9 Grounds listed on the face of the Notice of Motion, and elaborated in the Supporting Affidavit of the Respondent's Learned Counsel, George Kithi, sworn on 25<sup>th</sup> February 2021.
6. The principal Grounds are that, the 2<sup>nd</sup> Respondent was Chief Executive Officer at all material times; the 1<sup>st</sup> Respondent is a Body Corporate; and the 1<sup>st</sup> Respondent is the only entity reposed with the power to sue and be sued, under its constitutive law.
7. The Claim against the 2<sup>nd</sup> Respondent is misplaced.
8. The Claimant filed Grounds of Opposition dated 8<sup>th</sup> March 2021. Her position is that the Application filed by the Respondents is *res judicata*. Similar objection was made by the Respondents, and declined by the Court in a Ruling dated 30<sup>th</sup> December 2015.
9. It is amplified by the Claimant that, the 2<sup>nd</sup> Respondent did not act in good faith, in dealing with the Claimant. He is personally liable. His personal actions justifying joinder, are disclosed in the Amended Statement of Claim. He dismissed the Claimant without reference to 1<sup>st</sup>

Respondent's Human Resource Department.

10. Parties agreed before the Court on 26<sup>th</sup> February 2021, to have the Application determined on the strength of their Pleadings and Submissions. They confirmed filing and exchange of Submissions at the last virtual mention, on 3<sup>rd</sup> June 2021.

11. Ruling was reserved for 30<sup>th</sup> July 2021, but regrettably the Court was not sitting.

**The Court Finds:** -

12. The Claimant was employed by the 1<sup>st</sup> Respondent Corporation, as Supply Chain Officer, on 21<sup>st</sup> September 2011.

13. Her letter of appointment was signed by Chief Executive Officer, Roba Duba. It was not signed by the 2<sup>nd</sup> Respondent.

14. Her probationary period under contract was extended in a letter dated 4<sup>th</sup> May 2012. Extension was by Acting Chief Executive Officer Bernard Mbogoh. It was not by the 2<sup>nd</sup> Respondent.

15. She was confirmed on permanent and pensionable terms in a letter dated 25<sup>th</sup> March 2013. Confirmation was by the Chief Executive Officer, now the 2<sup>nd</sup> Respondent herein, David Koross.

16. The Chief Executive Officer is an Employee of the Respondent. As can be seen from the above letters of appointment/ probation/ confirmation, the position of Chief Executive Officer has been held by different persons over time, during the Claimant's tenure.

17. The position is created by the Act. The Holder serves on term-contract, prescribed by statute.

18. The Claimant did not have a contract with any of the Chief Executive Officers. Her contract was with the 1<sup>st</sup> Respondent, a Body Corporate imbued with the power to sue and be sued.

19. Although Agents, Foremen, Managers or Factors of Employers [including Public Bodies] may be deemed to be Employers under Section 2 of the Employment Act, there is no justification in holding the Chief Executive Officer of the 1<sup>st</sup> Respondent, a Public Body to be an Employer. The Claimant's contract, and the law creating the 1<sup>st</sup> Respondent, are specific on who the Employer is. There is no reason in applying the broader definition of the term 'Employer,' in a matter where the relevant contract and the law, have clearly stated who the Employer is. The roles of the Chief Executive Officer and that of the 1<sup>st</sup> Respondent, are clearly defined by the statute.

20. Any actions taken by the 2<sup>nd</sup> Respondent, unfair or unlawful, against the Claimant, were taken in the name of the 1<sup>st</sup> Respondent. The actions cannot be attributed to the 2<sup>nd</sup> Respondent individually. He did not have a contract with the Claimant.

21. It is difficult to understand how the 2<sup>nd</sup> Respondent can be compelled to pay the Claimant compensation for unfair termination from his own pocket. He was an Employee, like the Claimant. He was executing his mandate as the Chief Executive Officer.

22. The Act creating the 1<sup>st</sup> Respondent grants the 1<sup>st</sup> Respondent the power to sue and be sued. It has not delegated this power to any of its Employees. It has not delegated to the Chief Executive Officer. It cannot be implied that the 2<sup>nd</sup> Respondent employed the Claimant and should share employment liability with the 1<sup>st</sup> Respondent.

23. The Application is not *res judicata*. The Court dealt with the capacity of the Local Authorities Provident Fund vis-à-vis the Local Authorities Provident Fund Board, as the Respondent. The Court allowed the Claimant its Application to amend the Claim, while dismissing Preliminary Objection to strike out the Claim, bringing in the Board in place of the Fund.

24. It was the finding of the Court that the Fund and the Board are creatures of the Act, the Fund being the *juridica persona*, and the technical anomaly was capable of rectification, without occasioning the Respondents prejudice.

25. The Ruling did not touch on the capacity of the Chief Executive Officer, to be sued individually, in this Claim.

26. The Court is persuaded that David Koross, Chief Executive Officer, is improperly joined to this Claim.

**IT IS ORDERED:** -

**a. The 2<sup>nd</sup> Respondent, David Koross is discharged from these proceedings.**

**b. No order on the costs.**

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10<sup>TH</sup> DAY OF AUGUST 2021.**

**JAMES RIKA**

**JUDGE**