



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 30 OF 2016

ENG MOSES AGUMBA OROT..... CLAIMANT

v

CHAIRMAN, BOARD OF DIRECTORS, LAKE VICTORIA

SOUTH WATER SERVICES BOARD.....1st RESPONDENT

CABINET SECRETARY, MINISTRY OF

WATER AND IRRIGATION.....2nd RESPONDENT

JUDGMENT

1. This Cause was heard on 9 October 2018 and 13 February 2020, when Eng Moses Agumba Orot (the Claimant) testified, and on 17 March 2021, when a Human Resources Manager with the Lake Victoria South Water Services Board (the Board) testified.

2. The Claimant sought the following remedies:

- (a) Unconditional reinstatement to the position held before unfair dismissal with full benefits.
- (b) A declaration that the termination of the Claimant was unlawful since it is the Cabinet Secretary who is vested with the powers to hire and/or fire the Chief Executive Officer of the Lake Victoria South Water Services Board.
- (c) In the alternative payment for damages in terms of paragraph 24 above.
- (d) Costs of this suit.
- (e) Interest on (a) above.
- (f) Any other relief that the Court may deem fit and just in the circumstances.

3. The Claimant filed his submissions on 13 May 2021, the Board on 25 June 2021, while the Cabinet Secretary, Water (the Cabinet Secretary), filed his submissions on 16 June 2021.

4. The Court has considered the pleadings, evidence and submissions.

5. The Court will adopt the Issues as identified by the parties in their submissions, but first, some background of the largely undisputed facts may be in order.

Background

6. The Claimant was initially appointed as Chief Manager, Technical Services through a letter dated 1 March 2010.

7. On 2 May 2014, the Board issued a show-cause notice to the Claimant, and the allegation was the failure to prevent payment of salaries to people who are not part of the staff establishment.

8. The Claimant responded to the show-cause on 22 May 2014.

9. The Board considered the response, and on 16 July 2014, it issued a warning letter to the Claimant.
10. On or around 29 January 2015, the Cabinet Secretary appointed the Claimant as the Chief Executive Officer of the Lake Victoria South Water Services.
11. During an audit for 2015/2016, a variance of KShs 14,483,154/- was detected, and the Board instructed the Claimant on 27 August 2015 to step aside to enable further investigations.
12. The Claimant moved the Court in Kisumu Misc Civil Suit No. 8 of 2015, *R v Board of Directors, the Lake Victoria South Water Services Board ex-parte Eng Moses Agumba Orot*, and the Court issued an order on 2 September 2015, granting the Claimant leave to commence judicial review proceedings.
13. The leave was to operate as a stay of the proceedings and decision of the Board made on 27 August 2015 (instructing the Claimant to step aside).
14. On 3 September 2015, the Claimant went to serve the High Court order upon the Board.
15. On 17 September 2015, the Board suspended the Claimant from duty for 3-months.
16. The allegation was that the Claimant had on 3 September 2015 caused damage to Board's property (breaking and changing office locks) while serving the High Court order accompanied by rowdy youths.
17. The letter also instructed the Claimant to make a written response to the allegation(s) and to appear before the Board on 2 October 2015 to defend himself.
18. The Claimant responded on 28 September 2015, indicating that he would not appear before the Board because of the stay orders granted by the High Court.
19. The Claimant responded to the suspension letter on 28 September 2015, contending that the decision was in contempt of a court order and therefore he would not appear before the Committee (the Claimant did not appear before the Disciplinary Committee).
20. The Ministry of Water was concerned with the state of affairs at the Board, and on 14 October 2015, the Principal Secretary convened a meeting to be held in Nairobi on 21 October 2015.
21. The Board met on 19 October 2015, and part of the agenda were the consideration of the report from the Disciplinary Committee on the 2 allegations against the Claimant arising from the payroll audit, and the disruption of the Board meeting and destruction of property while accompanied by rowdy youth.
22. The Board adopted the recommendation of the Committee to dismiss the Claimant, and through a letter dated 19 October 2015, he was notified of summary dismissal.
23. The grounds for dismissal were the payroll queries and that the Claimant had led a group of rowdy youth who destroyed public property and disrupted a meeting of the Board on 17 October 2015.
24. Meanwhile, on 29 October 2015, the High Court, upon the application of the Board, the High Court set aside the stay order which had been granted to the Claimant on the ground of material non-disclosure.
25. On 10 February 2016, the Claimant sued the Board and Cabinet Secretary, alleging unfair termination of employment and breach of contract.

Unfair termination of employment

Power of the Cabinet Secretary

26. Among the grounds upon which the Claimant challenged his dismissal was that the power to dismiss the Chief Executive Officer of the Board was the mandate of the Cabinet Secretary, Water and not the Board.
27. The Claimant did not take up the issue during oral testimony or in the submissions. He also did not reveal the source of the Cabinet Secretary's power to dismiss a Chief Executive Officer of a state corporation.
28. Nevertheless, under section 5(3) of the State Corporations Act, the mandate to recruit and set terms and conditions of service of the Chief Executive Officer is given to the Board of a state corporation.
29. This challenge was, therefore, without a legal foundation.

Effect of stay orders issued by the High Court on 2 September 2015

30. The Claimant also contended that the dismissal was unfair because there were stay orders issued by the High Court on 2 September 2015.

31. The Court has looked at the part of the proceedings and orders of the High Court to examine whether it stayed the disciplinary case arising from the events of 3 September 2015.

32. The High Court order related to decisions of the Board taken on 27 August 2015, directing the Claimant to step aside in relation to allegations arising from an audit on the payroll for 2015/2016 (payroll variance) and a private prosecution the Claimant was facing.

33. The suspension of the Claimant on 17 September 2015 was based on fresh allegations, and in the view of the Court, were not anticipated by the stay order of 2 September 2015.

Double punishment

34. The Board also made reference in the dismissal letter to allegations of payroll fraud in 2014.

35. The Board had issued a show-cause notice to the Claimant on 2 May 2014, in respect to the payroll allegations, and upon consideration of the Claimant's response, it opted to sanction him with a warning.

36. In fact, in January 2015, the Board promoted the Claimant to the position of Chief Executive Officer.

37. The Board had dealt with the payroll fraud in 2014 and sanctioned the Claimant with a warning.

38. In the Court's view, and the Court so finds, it was not open to the Board as a matter of both procedural and substantive fairness to reopen the payroll fraud case afresh in 2015 after it had meted a sanction upon the Claimant in 2014.

Procedural fairness

39. Section 35(1)(c) of the Employment Act, 2007 requires an employer to give written notice of termination of employment (unless it is a case of summary dismissal).

40. The Claimant was dismissed summarily, and therefore the notice may not be applicable.

41. The principal reason for the dismissal of the Claimant were the events of 3 September 2015, wherein it was alleged that the Claimant had disrupted a Board meeting and destroyed properties of the Board (breaking and changing locks to the office door).

42. The Board issued a suspension/show-cause notice to the Claimant on 17 September 2015 and also invited him to appear before the Board on 2 October 2015 to defend himself.

43. The Claimant admitted receiving the notice and stated that he could not attend the hearing because it was in contempt of court orders issued by the High Court on 2 September 2015, and further that the hearing coincided with a meeting called by the Ministry through the letter dated 14 October 2015.

44. Through the suspension/show-cause and the invitation to appear before the Board on 2 October 2015, the Court is satisfied that the Board afforded the Claimant an opportunity to be heard, but he snubbed the invitation.

45. The Claimant also asserted that he could not have attended the hearing on 2 October 2015 because the Ministry had called a meeting involving the Board and himself on the material day.

46. However, the invitation letter from the Ministry is dated 14 October 2015, and it indicates that the meeting was set for 21 October 2015.

47. The Court is, therefore, unable to accept the explanation by the Claimant that it was not possible or reasonable to expect him to appear before the Board on 2 October 2015.

48. The Court finds that the Board was in substantial compliance with the tenets of procedural fairness as envisaged by sections 35(1)(c) and 41 of the Employment Act, 2007.

Substantive fairness

49. By dint of sections 43 and 45 of the Employment Act, 2007, the Board had the burden of proving the validity and fairness of the reasons for dismissing the Claimant.

50. The Board gave 2 reasons for dismissing the Claimant.

51. The primary reason was that the Claimant had on 3 September 2015 disrupted a Board meeting and destroyed the Board's property while accompanied by rowdy youths.

52. The Board's witness testified that on the material day, the Claimant, while accompanied by rowdy youths, broke into his office while on suspension and changed the locks purportedly to enforce stay orders granted by the High Court.

53. The Board reported the incident at Central Police Station vide OB 67/3/9/2015.

54. During cross-examination, the Claimant denied that he led a group of youths to destroy the Board's properties but admitted that he broke the locks to the office and replaced them. He also testified that he had sought the assistance of the police to enforce the stay orders by reinstating him to office.

55. It is not in dispute that the Claimant had obtained stay orders, and he served the orders on 3 September 2015.

56. The effect of the orders were that the Claimant should resume work pending the determination of the judicial review proceedings he had filed.

57. While serving the orders, the Claimant broke and changed locks to his office. He did not demonstrate that the Board had attempted to or restrained him from resuming work.

58. The Claimant was the executive head of the Respondent and was expected to conduct himself with grace and courtesy. He did not give the Board sufficient time to study the order and or consult its legal advisors. He could have gone back to the High Court to get enforcement orders or security assistance to return to the office. The Claimant took up matters in his hands.

59. In the Court's view, the Claimant was misconducting himself by breaking into his office considering his position in the Respondent.

60. The Court finds that the Board had and has proved valid and fair reasons to dismiss the Claimant.

61. Compensation and salary in lieu of notice are therefore not available remedies to the Claimant.

Breach of contract

Gratuity

62. The Claimant's contract provided for payment of gratuity at a rate of 31% of basic annual salary upon successful completion of the contract.

63. The clause also provided that gratuity would not be payable if the separation was due to gross misconduct.

64. The Court has upheld the dismissal of the Claimant on the ground of gross misconduct. Contractually, he is not entitled or eligible to gratuity.

Salaries for October, November and December 2015

65. The Claimant was dismissed with effect from 19 October 2015 and would be entitled as of right to earned remuneration up to that date only.

66. Any claims for salaries after 19 October 2015 are contractually and legally untenable.

Conclusion and Orders

67. From the foregoing, the Cause is dismissed with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Omondi, Abande & Co. Advocates

For 1st Respondent Owiti, Otieno & Ragot Advocates

For 2nd Respondent Office of the Honourable Attorney General

Court Assistant

Chrispo