



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 94 OF 2017

DR. SAMUEL GITAU KINYANJUL.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD,

KIRINYAGA COUNTY.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued seeking relief for his alleged unfair termination from employment. The Claimant averred that he was a Chief Officer, Department of Medical Services Public Health & Sanitation earning a salary of Kshs. 350,660/-. The Claimant averred that he was, as part of his duties, the Authority to Incur Expenditure (AIE) for the needs of the Department of Medical Services Public Health & Sanitation. The Claimant averred that there were inordinately frequent referrals from Kimbimbi Hospital the second largest hospital in the County serving the densely populated Mwea region particularly with expectant mothers requiring delivery through surgical intervention. He averred that to remedy the situation, the hospital required a 100 Kva Generator for power back up and unfortunately there was no budgetary allocation. The Claimant averred that some Kshs. 4,000,000/- had been approved for the purchase of a 200 Kva generator for Kerugoya Hospital, which in any case was not adequate for the bigger 200 Kva generator. He averred that the Department therefore decided to use the funds originally meant for Kerugoya Hospital to attend to the more urgent and cheaper generator at Kimbimbi Hospital. The Claimant averred that he therefore requested Kerugoya Hospital to prepare a requisition for 100 Kva generator and thereafter the head of the Hospital Maintenance Unit prepared the specifications which the Claimant countersigned for approval and forwarded the same to the Director Supply Chain Maintenance on 15th May 2015. The Claimant averred that the preparation and floatation of the tender documents went through the normal process and that there was no input from the Claimant as an office or person in the procurement process until the award of a tender to the successful bidder. The Claimant averred that the Local Purchase Order (LPO) was raised by the Department and he approved it on 7th July 2015 and that the raising of the LPO strictly followed the normal procedures and was in conformity with the requirements of the process flow. He averred that the delivery was done to Kimbimbi Hospital as confirmed by the 3 officers designated to oversee the delivery and that the process of payment was undertaken in conformity with the requirements. The Claimant averred that he approved the voucher for payment on 7th October 2015. The Claimant averred that in November 2015 complaints reached him in regard to the generator and he asked the head of the maintenance unit to contact the supplier to come and correct the anomalies noted in the erratic performance of the generator. The Claimant averred that he was informed by the head of the maintenance unit and her colleague who was the hospital maintenance officer at Kimbimbi that the supplier came and explained that the problem was that someone had interfered with the emergency knob and that there was an automatic switch which the supplier promised to attend to within a week. The Claimant averred that he was later informed by the same staff members that the supplier had come and replaced the automatic switch and conductors. The Claimant averred that the erratic performance persisted but the supplier no longer responded to the Department's calls in spite of the Claimant's best efforts together with the Department staff. The Claimant averred that he asked the head of the maintenance unit to check the generator and give a report to him which she did indicating that the control module of the generator was faulty causing it to require to be operated manually. He averred that she also noted that the generator was also due for maintenance. The Claimant averred that on the same day he wrote a complaint letter to the supplier intimating of the Department's plans to seek legal redress if the generator was not repaired and all faults resolved to the satisfaction of the Department. He averred that thereafter he wrote an official letter to the Department of Infrastructure and Transport commonly referred to as the ministry of works requesting for technical assessment of the generator by a qualified electrical engineer to assess whether the generator met the technical specifications in the tender documents. He averred that when no response was forthcoming he escalated the matter to the County Executive Committee Member (CECM) of the department who in turn wrote to his counterpart in the ministry of works on 23rd December 2015. The Claimant averred that he waited for the report to no avail and he found it curious that no report was made available making it impossible for him to make an informed assessment of the problem and how best to remedy the situation. He averred that on 27th January 2016 the CECM responsible for the Department called the Claimant to his office at around 5.30pm and handed him an interdiction letter signed by the County Secretary. The Claimant averred that the interdiction letter did not have any allegations against the Claimant in person neither did it require any response from him or a time frame for the interdiction, investigation if any over the matter. The Claimant averred that the interdiction letter adverted to a preliminary internal investigation on the matter of the generator, the purport, subject and the

findings of which the Claimant was never informed nor given an opportunity to respond to any such allegations. The Claimant averred that the warranty period for the generator was expressed to expire on 24th September 2016 and that if the matter was not concluded before then, the 1st Respondent would not be able to bind the suppliers to any liability. The Claimant averred that he had no doubt in his mind that he did the very best he could in the circumstances. He averred that on 10th June 2016 he received summons to appear before the County Assembly Committee on Medical Services & Sanitation and that he appeared on 14th June 2016 in the company of his Advocate where the hearing was conducted. The Claimant averred that he provided a detailed affidavit in response to the matters inquired into and answered all the questions that were raised. He averred that no response was communicated to the Claimant following the hearing to date. The Claimant averred that on 14th July 2016 the Respondent wrote a letter inviting the Claimant to appear before an Ad Hoc County Disciplinary Committee on 20th July 2016 on the same matter. The Claimant averred that he wrote back on 19th July and responded in great detail to all the accusations in the letter of 14th July 2016. The Claimant averred that on 20th July 2016 he appeared before the Ad Hoc Committee for the hearing and noted that it was not proper to have the Director Supply Chain Management whom he had adversely mentioned present at the hearing as well as new evidence that had not been availed to Claimant along with the letter of 14th July 2016, the letter of 15th January 2016 which was the report of a technical team on results of an investigation on the generator, his request to call his own witnesses was declined by the Committee. He averred that he was served with a letter terminating his services on 25th July 2016 and that during his period of interdiction he was on half pay. The Claimant averred that despite demand, the Respondent had declined to admit liability for the unfair termination or pay the salary for November 2011 and 8 weeks salary in lieu of notice. The Claimant thus sought a declaration that the termination was unfair, 12 months pay damages for unlawful termination – Kshs. 4,207,920/-, ½ pay for the months of February to July 2015 – Kshs. 1,051,980/-, interest on the sums at court rates from the day each payment fell due and payable to payment in full, certificate of service and costs of the suit.

2. The 1st Respondent filed a defence in which it averred that the Claimant was tasked with the role of the general administration and coordination of the Respondent's Medical Services Public Health and Sanitation Department. The 1st Respondent averred that the Claimant as the overall head was under obligation to ensure that what was delivered was in conformity with the specifications of what was tendered and approved. The 1st Respondent averred that the generator would not have been purchased had the Claimant not applied and approved and/or sought its purchase, in the event that the personnel delegated the responsibility for receiving the generator made any unsound decisions, then the Claimant as the head of the Department was culpable. The 1st Respondent denied that the generator developed relevant mechanical problems a month from the date of delivery but rather it developed problems within two weeks or so after the delivery and the Claimant ought to have alerted the requisite department(s) or the accounts department not to process payment for the generator until the apparent payments were rectified. The 1st Respondent averred that evidently, the failure to do so which was deliberate on the Claimant's part facilitated the payment of the tender sum one month after the delivery of the generator and after multiple problems had been detected. The 1st Respondent averred that the Claimant did not write any letter timeously and that he was interdicted to allow further investigations which was procedural, lawful and necessary taking into account the allegations levelled against the Claimant. The 1st Respondent averred that in view of the past actions of the Claimant which acts of commission and omission and which had led to the installation of a reconditioned and/or defective generator the Claimant was not the solution to mitigate the loss and inconvenience the Respondent stood to suffer. The 1st Respondent denied that the Claimant acted to the best interest of the 1st Respondent nor did he act professionally and responsibly. The Respondent averred that the Claimant was given adequate hearing contrary to the averment made in the statement of claim. The 1st Respondent averred that the Claimant made no objection to any member of the meeting that took place on 20th July 2017 and that any averment to the contrary is not only an afterthought but misguided. The 1st Respondent averred that there was no new evidence introduced during the hearing and that the Claimant's services were terminated on good grounds. The 1st Respondent made no admission of the Court's jurisdiction. The 1st Respondent averred that the Claimant's suit was misconceived, lacked legal basis, was unsustainable and an abuse of the court process reason wherefore the 1st Respondent prayed that the Claimant's claim be dismissed with costs.

3. The Claimant amended the memorandum of claim pursuant to leave granted wherein he added the County Public Service Board of Kirinyaga County as the 2nd Respondent to the suit. The Claimant averred that his job description in the appointment letter did not include responsibility for procurements by the department as the procurement function was exercised through a centralised supply chain department located within the County Treasury. The Claimant averred that 2nd Respondent had disciplinary control over and was mandated to remove persons holding office in the county public service and thus had disciplinary jurisdiction over the Claimant. He averred that the 2nd Respondent was mandated under the Employment Act to hear and consider any representations which an employee may make on the allegations against the employee before terminating the employment of that employee. The Claimant averred that the interdiction letter originated from the office of the Governor. The Claimant averred that the Ad Hoc Committee he was invited to appear before on 20th July 2016 was a committee of the 1st Respondent and not a committee of the 2nd Respondent. The Claimant averred that he appeared before the 1st Respondent's said ad hoc committee for the hearing. The Claimant averred that the termination was based on a letter written by the 2nd Respondent by the office of the Governor directing the 2nd Respondent to terminate the Claimant's employment. The Claimant averred that he never appeared before the 2nd Respondent for any hearing before the termination of his employment and that was therefore unlawful, unprocedural and an infringement of the Claimant's right to due process under the Employment Act. The Claimant averred that the purported hearing conducted by the 1st Respondent's ad hoc committee on 20th July 2016 was a sham hearing designed to rubberstamp the decision of the office of the Governor, Kirinyaga County to terminate the employment of the Claimant. The Claimant averred that his termination was unfair as there was no valid reason for the termination. The Claimant thus sought judgment against the 1st and 2nd Respondents jointly and severally for the reliefs enumerated in his memorandum of claim.

4. The amended response by the 1st and 2nd Respondents was that the Claimant was designated as an accounting officer in line with Section 45 of the County Governments Act and that the Claimant was the overall authority to incur expenditure (AIE) for the Department of Medical Services, Public Health & Sanitation. The Respondents averred that the Claimant was accountable to the County Assembly for the medical/health expenditure of the entire 1st Respondent County. The Respondents averred that by virtue of the Claimant's appointment as the Chief Officer Medical, the Claimant was tasked with the general role of administration and coordination of the respective County departments in relation to health and this being a senior position he was required at all times to perform his duties with a high degree of commitment and due diligence. The Respondents averred that the Claimant having the overall authority to incur expenditure in the 1st Respondent County expenses relating to health and having the final approval before any expense was incurred, he had the moral, legal and

statutory obligation and responsibility of protecting all the 1st Respondent's funds. The 2nd Respondent averred that it carried out disciplinary control as it is mandated over the Claimant and the Respondents averred that all the tenets of natural law and justice were duly followed as per law required. The 2nd Respondent averred that it conducted a hearing for the Claimant as per law required and the Claimant was duly accorded an opportunity to defend himself and respond to the accusations levelled against him. The Respondents averred that the Claimant was required to make input into the procurement process so as to satisfy himself that all the specifications of the generator required had been met as he was the overall accounting officer and failure to do so means that he committed an offence of omission as he failed to perform his duties diligently as required by law. The Respondents averred that the generator in issue was being procured for Kimbimbi Hospital within the ambit of the health services to which the Claimant was the appointed chief officer and that his role cannot be entirely delegated as his approval was required before the purchase of the generator could be finalised. The Respondents averred that the said approval was not to be issued without applying due diligence. The Respondents averred that the Governor of the 1st Respondent did not write any interdiction letter as the same was duly done by the County Secretary who is both the County Secretary and Head of County Public Services. The Respondents averred that the Ad Hoc Disciplinary Committee held on 20th July 2016 was a committee of both the 1st and 2nd Respondents and not the 1st Respondent only as the County Secretary was also the Head of County Public Service Board. The Respondents averred that the Ad Hoc Committee had representation from the County Public Service Board and that the process of termination was lawful and procedural and all the principles of natural justice followed.

5. The Claimant filed a reply to the amended statement of defence by the Respondents wherein he averred that the procurement function was not delegated to him when he was appointed to the position of Chief Officer, Department of Medical Services, Public Health and Sanitation and that instead the procurement function was centralised and was exclusively exercised by the Director Supply Chain based at the County Treasury. The Claimant averred that the tender opening committee, the evaluation committee and the tender committee were all constituted by the director supply chain who also informed the winning bidder of the award to supply the generator for Kimbimbi sub-county hospital. The Claimant averred that he performed his duties as the Chief Officer lawfully and diligently by countersigning the specifications for the kind of generator that was required for Kimbimbi Subcounty Hospital which was not in issue and by signing the internal requisition form for the purchase of a generator. He averred that the process for the opening and evaluating tenders and awarding them was centralised and done by the supply chain unit headed by the Director Supply Chain. The Claimant averred that he was not invited by the 2nd Respondent for a disciplinary hearing and that he did not attend a disciplinary hearing before the 2nd Respondent and not a single member of the 2nd Respondent was present or attended the Ad Hoc Disciplinary Committee meeting. The Claimant averred that the Ad Hoc Disciplinary Committee of 20th July 2016 was not a committee of the 2nd Respondent and therefore the termination of the Claimant was unlawful, unprocedural and contrary to the principles of natural justice.

6. The Respondents filed a preliminary objection which was to the effect that there was no appeal competent or otherwise filed against the 2nd Respondent's decision made on 20th July 2016 and 25th July 2016 terminating the Claimant's services. The Respondents asserted that the suit was bad in law as it contravened the provisions of Section 77 of the County Governments Act which provided that decisions of the County Public Service Board were appealable to the Public Service Commission. The Respondents averred that the suit was null and void *ab initio* as the suit had contravened the provisions of Section 9(2) of the Fair Administrative Actions Act No. 4 of 2015 which states that the High Court shall not review an administrative action or decision unless the internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The Respondents asserted that the present suit was not properly filed before the court and therefore was an abuse of the court process, bad in law and a nullity and ought to be struck off with costs.

7. The Claimant testified as did the Claimant's witness Mr. Patrick Njue Mureithi. In his testimony, the Claimant stated that his duties were as set out in his letter of appointment. He testified that procurement was not listed as one of his duties. He stated that he was the head of the Department of Medical Services, Public Health and Sanitation. He testified that the specification for the generator were prepared for his Department and forwarded to the Director Supply Chain. He stated that the head of the maintenance unit prepared the specification and he approved them. He testified that after this was done there was a tender floated, preparation for tender documents, tender opening and tender award would follow. He stated that these were not part of his job but for the central procurement unit called the supply chain. He testified that he was not a member of the tender award committee, the tender evaluation committee or any of the committees tasked with the tender process. He stated that the minutes revealed that the supply chain was the central procurement unit and were involved in the process of acquisition of the generator. He testified that the letter awarding the tender was copied to him by the head of the supply chain and that the winning bidder responded on 1st July 2015 accepting the award. The Claimant testified that the local purchase order of 7th July 2015 for the supply of the generator formed the contract and the generator was delivered. He stated that there was an inspection and acceptance certificate from the inspection committee headed by a procurement officer seconded to his Department. He stated that it was not normal for the chief officer to receive goods supplied and that the generator was paid for. He testified that he signed the payment voucher as head of the Department and that he started receiving complaints about the generator in November which was 2 months after the delivery in September. He stated that the complaint was that the generator would not start automatically when there was disruption in the power and that he wrote to the supplier as there was a problem with the changeover switch despite intervention by the supplier after initial complaint. He testified that he wrote a letter dated 2nd December 2015 where he reported official complaints and demanded the resolution of the problems. He said that he copied the letter to the Director, County Attorney and the Minister for Health and that he escalated the matter when the supplier did not respond to his letter. He stated that he wrote to his counterpart to seek their assistance in assessing if the generator met tender specifications. He testified that at the time he did not know that the team was constituted and that at the time of his interdiction he did not know. He stated that the team constituted wrote a report on 15th January 2016 and the report was that the generator did not meet specifications. He testified that he did not see the bid documents and that the procurement team handling the procurement was meant to verify. He stated that he was summoned on 27th January 2016 and interdicted for the reasons that the generator was not new and the generator switch did not work. He stated that the letter did not require him to respond and that he was later summoned by the County Assembly where he attended and presented a written affidavit. He testified that the County Assembly did not take any action against him and he was later summoned by an Ad Hoc Disciplinary Committee on 20th July 2016. He testified that he appeared before the Disciplinary Committee as directed and that during the meeting he felt pressure that the Ad Hoc Committee was keen to blame the entire procurement upon him. He stated that he protested the attendance of the head of the Supply Chain and he was told that was the expert. He stated that he asked that his protestation be registered. He testified that he was ambushed with the inspection report and he was asked about the quality. He stated that the notice of interdiction was different from the issues at the meeting which was focused more on the findings of the inspection. He said the author were not present and that the chair was categorical that they had to finish the meeting that day. He testified that person who invited him was the head of public service but was not a member of the 2nd Respondent. He stated that no member of the 2nd Respondent was present to the best of his knowledge. He said that the letter of 26th July 2016 was authored by the Secretary County Public Service Board.

8. The Claimant's witness testified that he was at the time material to the suit the County Attorney for the 1st Respondent having been appointed in August 2014 and served his term exiting in August 2018. He stated he was not a member of the 2nd Respondent and that the minutes of a meeting that is stated to have taken place on 20th July 2016 was not in the presence of the members of the County Public Service Board. He testified that he had been invited to attend the meeting where the Claimant was to be heard and receive his side of the story then a decision would be made whether the Claimant was in any way culpable for what had transpired. He stated that there was a recommendation that the Claimant's services be terminated and that the Ad Hoc Committee did not make any recommendation as the Committee did not convene thereafter to deliberate on the matter. He testified that in his opinion the Public Service Board had the mandate to exercise disciplinary control over members of the County Public Service.

9. Submissions were to be filed and none were on record at the time of writing this decision. The Claimant's suit was challenged on the grounds that there was non-compliance with Section 77 of the County Governments Act No. 17 of 2012 as decisions of the County Public Service Board are appealable to the Public Service Commission. In addition, there was a challenge that the suit was void *ab initio* as it offended the provisions of Section 9(2) of the Fair Administrative Actions Act No. 4 of 2015. Section 77 of the County Governments Act provides that the decisions of the Public Service Board are appealable to the Public Service Commission. Notably, there is no appeal indicated to have been preferred by the Claimant. In addition, Section 9(2) of the Fair Administrative Actions Act provides that parties exhaust the internal appeal mechanisms before initiating court action as the high court should not review administrative action unless the internal mechanisms are exhausted. As held in the case of **James Tunai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** where Mumbi J. (as she then was) stated where there was an alternative forum provided in law being the forum prescribed by Section 9 of the Fair Administrative Actions Act and Section 77 of the County Governments Act in the event the decision to terminate which is in dispute was executed by the County Public Service Board the 2nd Respondent herein. Since the Claimant did not seek to exhaust the process under the Fair Administrative Actions Act, the decision to proceed with the suit was misplaced and premature. The suit is dismissed for failing to adhere to the provisions of the law. There shall be no order as to costs as the Respondents failed to participate in the final stages of the suit having indicated that they made no admission to the jurisdiction of the Court.

10. As the decision is rendered during the Covid 19 pandemic, in keeping with the directives of the Chief Justice and the National Council on the Administration of Justice and the guidelines issued by the Chief Justice in the Gazette Notice scaling down court operations, the decision will be automatically stayed for 14 days so as to permit parties who may otherwise be in quarantine to take any requisite action prior to any adverse action being taken such as commencement of execution and the like.

It is so ordered.

Dated and delivered at Nyeri this 27th day of May 2020

Nzioki wa Makau

JUDGE