



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2061 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 21st May, 2020)

JOSEPHINE MWANDOE.....CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim on 19/11/2016. On 29/4/2019, the Claimant was directed to file an application to amend the Claim and join the Cabinet Secretary, Ministry of Finance but no amendment was made to the claim.

2. The Claimant avers that by a letter dated 25/2/2013 from the Permanent Secretary, Treasury he was appointed as a member of the Board of Directors of the Respondent. She avers that the pursuant to the terms set out in the appointment letter, she was to serve in that capacity for a period of 3 years with effect from 20/2/2013.

3. She avers that in June 2013, new Directors were appointment to take over the management of the Respondent thus rendering other board members and her redundant. She avers that her dismissal was done without any formal communication. She therefore contends that that the dismissal was in bad faith and in breach of Section 41 of the Employment Act and Section 185 (2) of the Companies Act.

4. The Claimant seeks the following prayers:-

a) A declaration that the Respondent's termination of the Claimant's contract of employment was unfair, illegal, null and void ab initio.

b) An order for immediate reinstatement, or

c) Damages in the amount of Kshs. 4,246,928.96 being the due payment for the unserved contract.

d) Damages for wrongful and/or unfair termination of contract period.

e) Certificate of Service.

f) Costs of this suit.

g) Interests.

h) Any other or further relief that this Honourable Court may deem fit to grant.

5. The Respondent filed a Statement of Defence on 18/1/2015. It avers that it was notified of the Claimant's appointment as one of its Directors vide a letter dated 25/2/2013. It avers that the Claimant and the other 3 individuals were allowed to acquaint themselves with the operations of the board by attending its sittings in an observer capacity.

6. It avers that its Chief Executive Officer and Company Secretary in letters dated 11/4/2013 and 3/5/2013 sought advice from the appointing Ministry on when the Statutory Gazettement would be effected. It contends that the Office of the Solicitor General on 7/5/2013 state that it had been instructed to suspend all new appointments pending the appointment of relevant Cabinet Secretaries to respective ministries.

7. It avers that on 12/7/2013 it wrote to the Ministry of Finance reminding it that it had sent notifications of appointments of 4 individuals, including the Claimant, who had not been gazetted in accordance with Section 6 of the State Corporations Act. Further, in the absence of the gazettement of the said 4 Directors, the number of Directors of the Respondent was below the minimum threshold in accordance with the Memorandum and Articles of Association as well as the Central Bank of Kenya Prudential Guidelines.

8. It aver that on 23/12/2013 and 10/2/2014 new Directors were appointed and gazetted to the Respondent's Board of Directors. It avers that it informed the Cabinet Secretary, National Treasury that it was necessary that the notifications of the Directors whose appointment had not been formalized by gazette notice be revoked.

9. It avers that on 15/5/2014, it held an Extra Ordinary General Meeting of which Notice had been served on the Claimant when its shareholders considered for approval and resolved to remove the Claimant together with 3 others as its Directors. It contends that on proposal of the Deposit Protection Fund and secondment by the National Social Security Fund, it was resolved by the shareholders that the Claimant be removed as a Director of the Respondent.

10. It denies any liability as claimed by the suit and avers that it was not the appointing authority. It avers that it notified the Claimant her appointment had to be formalised by notice in the Kenya Gazette. It avers that the Claimant was further aware that it was not responsible for her purported removal or redundancy.

11. It avers that the removal of the Claimant as its Director was legal and in accordance with Companies Act in order to avoid contravention of its Memorandum and Articles of Association.

12. It avers that the removal of the Claimant as a Director was necessitated by the fact that the Respondent's Memorandum and Articles of Association provides for a maximum of 10 Directors and allowing 12 Directors on its Board would be in breach of the same. It avers that the notice of removal of Director under Section 185 (2) of the Companies Act was served by way of personal service on 17/4/2014.

13. It maintains that its joinder in this suit is misconceived and ill-advised hence any claims that arise should be directed to the National Treasury.

Claimant's case

14. The Claimant, Cw1, testified that she was appointed a Director of the Respondent vide the letter dated 25/2/2013. She testified that prior to her appointment she had worked as Head Teacher and had retired as a Principal Ngara Girls High School. She stated that she applied to the Ministry of Finance for any vacant position and it is then that she was appointed as a Director at the Respondent.

15. She testified that she was invited for a photo session after the appointment and underwent a 2 weeks induction course conducted by the Institute of Directors Kenya. She testified that she was remunerated as a Director as indicated in her payslip. She testified that that her appointment was not conditional on any happening.

16. She denies seeing the letter produced by the Respondent between it and the Permanent Secretary Treasury. It was her testimony that she learned that the gazettement of all Directors was delayed but the Directors were not suspended. She testified that she never received any letter indicating that her appointment had been suspended. She contended that she was not informed that her appointment was subject to gazettement.

17. She stated that she sued the respondent since the management of the Respondent is the one that verbally terminated her contract. She stated that she neither received any communication from the Respondent before her removal from the Bank nor was she issued with a Certificate of Service.

18. She testified that new board members were appointed but she did not attend that meeting. According her, it would not have been necessary to appoint new Directors if they were excess. She stated that she expected to serve the Respondent for 3 years. She stated that in order to remove her a Director, she ought to have been summoned if she had committed any wrongdoing. She testified that her dignity was violated.

19. In cross-examination, she testified that she was aware that she needed to be appointed vide a Gazette Notice. She testified that when they wanted to recruit a CEO they pushed for their gazettement. She however testified that she did not know if they were gazetted.

20. She testified that her appointment was to be revoked by either the President or the Ministry of Finance. She testified that the Bank through the shareholders initiated their termination. She testified that she did not know if the appointment of the new Directors superseded their appointment. She further testified that she was not gazetted and there was no letter explaining their non-gazettement.

21. She testified that after her appointment, she reported in February 2013 and was given a timetable of board meetings. She stated that she did not attend the meeting (Extra Ordinary General Meeting) she was aware of the meeting's agenda. She testified that the Respondent's documents at pg. 37 indicate that a resolution was passed for her removal as a Director.

22. She stated that she left the Respondent in June 2013 and was already serving as a Director at Kenya National Assurance Company (2001) Ltd, having been gazetted to hold that position. She testified that she was still a Director at KNAC, after her termination as a Director at the

Respondent. She testified that she never wrote to the bank asking for reasons why she was not gazetted.

23. In re-examination, she testified that the minutes of the Special Annual General Meeting were not supplied to her.

Respondent's case

24. Wakonyo Igeria, the Respondent's Company Secretary and Head of Legal testified as Rw1. She adopted her Witness Statement filed on 17/8/2017 as her evidence-in-chief.

25. She avers that based on the notification and confirmation from the National Treasury the Claimant together with 3 individuals were appointed as the Respondent's Directors. She avers that on 3/5/2013, she wrote to the Ministry of Finance seeking advice on when statutory gazettelement of the Directors would be effected.

26. She stated that she is aware that on 15/5/2013 the Office of the Attorney General forwarded to the Permanent Secretary, National Treasury Gazette Notices for the Cabinet Secretary's signature. She stated that Article 88 of the Respondent's Memorandum and Articles of Association provide for a maximum of 10 Directors and the Central Bank of Kenya Prudential Guideline No. 3.4.6 on board composition. She avers that the Respondent on 12/7/2013 informed the Ministry of Finance that the number of its Directors were below the minimum threshold.

27. She stated that in respect of the new appointments, the Respondent in a letter dated 28/3/2014 informed the Cabinet Secretary, Treasury that the Board had 12 Directors which was in breach of Article 88 of the Memorandum and Articles of Association which provides for 10 Directors.

28. She avers that at the Extra Ordinary General meeting held on 15/5/2014, the Respondent's shareholders considered the removal of the Claimant together with other 3 individuals in accordance with Section 185 of the Companies Act and the Central Bank of Kenya Prudential Guideline No. 3.4.6. She avers that the notice of removal of the Director under Section 185 (2) was served upon the Claimant.

29. She stated that the removal of the Claimant as a Director was legal and was necessitated by the fact that allowing 12 Directors would have been in breach of the Memorandum and Articles of Association.

30. Upon cross-examination, she testified that the lack of gazettelement was never made known to the Claimant. She testified that under the State Corporations Act it was crucial to do so. She further testified that there were no minutes to show that the issue was discussed.

31. She testified that during the short time they served as Directors they sat in the meetings but did not form part of the resolutions of the meeting. She testified that the directors could not resolve any issues without being gazetted. She confirmed that the Directors were remunerated during the period they were in office.

32. She testified that the letter by the Respondent to the Permanent Secretary, Ministry of Finance and the Attorney General was not copied by the Claimant. She further testified that after the Extra Ordinary General Meeting, the Respondent did not serve the Claimant with a Notice of Removal but this notice was filed at the Companies Registry.

33. She testified that the Claimant has a legitimate expectation to serve as a Director as appointed. She testified that the Bank was never issued with a letter revoking the appointment of the Claimant. She further testified that the Bank has no capacity to remove the Claimant.

34. In re-examination, she testified that she has no capacity to revoke the appointment of directors.

Claimant's submissions

35. The Claimant submits that the guidelines for distinguishing or determining an employee's status as a director were laid down in **Eaton v Robert Eaton Limited (1988) I.R.L.R. 83**. She further submits that the Court in **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 Others [2014] eKLR** held that there are multiple tests in determining that an appointed Director was also an employee.

36. She submits that she was not privy to any correspondence between the Respondent and various state agencies regarding the gazettelement of her appointment and was never issued with a letter by the treasury suspending or revoking her appointment even after the letter dated 7/5/2013.

37. She submits that the Respondent's Board ought to have applied the 'last-in-first-out' (LIFO) principle as a criteria to remove her from office. She relies on the decision in **Tobias Ongaya Auma & 5 Others v Kenya Airways [2007] eKLR** that LIFO is a mandatory requirement under Kenyan Law and is referred to under Section 40 of the Employment Act.

38. She submits that the under Section 43 of the Employment Act, the onus of proving the reasons for redundancy in this case lay with the Respondent as it was to state the prescribed maximum and minimum number of directors in the Respondent's board. He submits that the Respondent did not adduce its Memorandum and Articles of Association and a list of directors to prove that its prescribed maximum was 12.

39. She submits that once the Respondent removed her from office, it never notified her of the same. She relies on the case of **Addah Adhiambo Obiero v Ard Inc [2014] eKLR** where the Court held that redundancy was unprocedural as the Claimant was not given notification a month prior to her termination.

40. She submits that she is entitled to exemplary damages for the Respondent's oppressive, arbitrary and unconstitutional actions. She relies on the case of **Rookes v Bernard (1964) AC 1129** where the Court held that exemplary damages can be awarded where there is oppressive conduct by government agents and where the acts of the defendants caused distress and intolerable anxiety.

Respondent's submissions

41. The Respondent submits that the applicable law in the appointment of the Claimant is the State Corporations Act. It submits that it is not contested that in terms of the State Corporations Act, the prerogative to gazette the Claimant's appointment was with the Cabinet Secretary National Treasury and not with the Respondent.

42. It submits that unless the formal requirement laid down in statute on gazette was observed no legitimate expectation could have arisen from an incomplete appointment. It relies on the Supreme Court decision in **Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others [2014] eKLR** which held circumstances when legitimate expectation arises.

43. It submits that the claim for legitimate expectation is misplaced as the Respondent was clear that the Claimant could not be actively involved in the duties of the Board of Directors, it was unreasonable for the Claimant to expect to serve as a director without gazette and the only competent decision maker on her gazette was the Cabinet Secretary, Treasury. It submits that no representation was made to the Claimant to invoke legitimate expectation.

44. It avers that the Claimant was not its employee as there was no contract of employment between the Claimant and itself. It submits that the Court of Appeal in **Richard Erskine Leakey & 2 others v Samson Kipkoeh Chemtai [2019] eKLR** held that where a contract of employment has been reduced in writing the parties are bound by its terms.

45. It avers that despite there being no contract of employment, the appointment was governed by Section 6 of the State Corporations Act which enable the appointing authority or the Claimant to terminate the appointment. It is therefore its submission that the Claimant is not entitled to payment for the unserved duration of a non-existent contract which would be a reward for acts neither desired nor performed.

46. It submits that owing to the incomplete appointment of the Claimant, the claim for unfair termination is misdirected. It submits that the **Employment Appeal Tribunal I Wilson v Trenton Service Station Limited EAT/100/87 23 June 1987** held that whether the Director paid Income Tax (PAYE) might be considered as an indicator of an "employee earner" payment of tax, and or statutory deductions does not confer employee status for the purpose of employment legislation.

47. It submits that the question of the position of the Respondent *vis -a -vis* the Claimant's appointing authority is pertinent and that the Claimant is aware that her claim lies with the Ministry of Finance for reason that on 29/4/2019, she sought an adjournment to amend her claim to include the Ministry as a Respondent.

48. It is the Respondent's case that it was neither responsible for the appointment or termination of appointment under Section 45 (2) of the Employment Act.

49. In respect of the claim for redundancy, it submits that the Claimant's invocation of the LIFO principle is improper as it has not made any claims or defence on grounds of redundancy. It is also its submission that the Claimant's appointment as a Director of Kenya National Assurance Company (2001) Limited constituted an appointment suitable and equivalent to her previous appointment under the same parent ministry.

50. In conclusion, it submits that the Claimant has failed to surmount the evidentiary burden of proof and urges the court to dismiss the suit with costs.

51. From the evidence before Court, the Claimant was appointed as Director of the Respondent vide a letter dated 25/2/2013 under the hand of Joseph K. Kinyua, CBS, PS Treasury.

52. The Respondents have argued that they are wrongly sued in this matter as they were not the appointing authority as evidenced above.

53. It is true that the appointing authority was Permanent Secretary, Treasury but the removal of the Claimant was sanctioned by the Respondents ordinary General meeting held on 15/5/2014 at 11 am.

54. In cross-examination, the Claimant also indicated that the Ministry of Finance also appointed other Directors after her removal who were also gazetted in appointment. She therefore admitted that the Ministry of Finance should explain why she was never gazetted.

55. The Claimant also admitted that she left the Respondent in June 2013 and that by then she was already serving as a Director at KNAC Limited and was appointed for this position.

56. In view of the evidence of the Claimant, her appointment was made by the Ministry of Finance and later though the extra ordinary meeting of Respondent decided to revoke her appointment, the same was duly confirmed by the Ministry of Finance who appointed and gazetted other Directors.

57. The Claimant has however in this case not sued her appointing and removing authority.

58. The argument by the Respondent that they are unfairly and irregularly sued holds water. It is my finding that the Claimant sued the

wrong party when they should have sued the Treasury or the Attorney General. The omission is fatal to the Claimant's case which I proceed to dismiss accordingly with no order of costs.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okoth for Claimant – Present

Respondent – Absent