



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 557 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BEATRICE NAKHUMICHA KHAOYA..... CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The Claimant served as a civil servant in the Ministry of Lands, Housing and Urban Development then known as the Ministry of Lands from 28th July 1986 to 16th June 2010 when she was dismissed from service.

The Respondent is the Hon. Attorney General of the Republic of Kenya sued on behalf of the Ministry of Lands, Housing and Urban Development then known as the Ministry of Lands and the Public Service Commission.

The Claimant was dismissed from service on account of gross misconduct for fraudulent registration of a lease, failure to prevent the registration of leases and facilitating the fraudulent registration of fake leases in Kitale by her superior. She appealed against the decision to the Public Service Commission but the appeal was disallowed.

Aggrieved by her summary dismissal, the appeal and review process, she instituted this claim on 4th April 2014 seeking the following reliefs–

- i. A declaration that the dismissal of the Claimant from the service of the Government of Kenya was unconstitutional, wrongful and unlawful.
- ii. An order for reinstatement of the Claimant to the service of the Government of Kenya.
- iii. In the alternative to prayer (ii) above, but in support of prayer (i) above, an award of damages for unconstitutional, wrongful and unlawful dismissal from service of the Government of Kenya, in addition to future earnings and benefits.
- iv. In consequence of the prayer (iii) above, the benefits that the Claimant had earned up to the time he was unconstitutionally, wrongfully and unlawfully dismissed from the service of the Government of Kenya, and future earnings and benefits.
- v. In the further alternative, the Claimant be given normal retirement with all the benefits as this Court deems just equitable.
- vi. Costs of this Claim.
- vii. Any other and/or further relief this Hon. Court deems just and/or equitable to grant.

The Respondent filed the response dated 30th September 2014, which was later amended on 3rd August 2016 pursuant to the leave granted on 28th July 2016; contending that due procedure was followed and the Claimant accorded a fair hearing before she was summarily dismissed. As such, the claim is scandalous, frivolous, vexatious and does not disclose any reasonable cause of action hence should be dismissed with costs.

The Claimant's Case

The Claimant avers that she was employed as an Assistant Land Registrar II. She avers that the allegations of fraud against her were investigated by the Ministry of Lands, Head Office and the Office of the District Criminal Investigation Kitale, and were found to be false.

However, she was still summarily dismissed on allegations that were never proved and which she had been cleared of hence the dismissal was unlawful.

She avers that her summary dismissal and the handling of the appeal and review process by the Public Service Commission, violated her constitutional and legal rights and was against the tenets of natural justice.

During trial, she testified as CW1. She informed this Court that she served as an Assistant Land Registrar for 5 months, with powers to sign documents. She stated that she was never told the reason for her suspension and that while on suspension she was only paid allowances but was later paid salary for only 7 months', after pleading to be paid.

It was the Claimant's testimony that though she was accused for signing leases without authority in January 2009, she never signed leases for the 5 months she acted. She stated that she only signed official searches. She testified that she was never prosecuted for any offence. She informed this Court that the lease she was accused of signing never appeared and was not amongst the documents taken by the document examiner.

During cross examination, she stated that one of her duties was to sign documents in consultation with the Nairobi office and that her boss was the one to confirm transactions with the Chief Land Registrar. She maintained that she was never afforded a hearing and that she only got the report after filing this suit.

On re-examination, she clarified that she always sought authority before signing documents.

The Respondent's Case

The Respondent avers that the Claimant was initially employed as a clerical officer job group D on temporary terms, but her terms of service were translated to probationary terms effective 1st October 1985. She was promoted to various positions over time until 26th November 1991 when she was re-designated to Assistant Land Registrar III and confirmed as a permanent and pensionable employee.

It is averred that the Claimant was given an opportunity to respond to the allegations of fraud raised against her, her case deliberated on by the Ministerial Human Resource Management Advisory Committee, investigations carried out, the report presented before the Committee for consideration. That the Committee found that the Claimant was guilty of gross misconduct for failing in her duties and recommended her dismissal to the Public Service Commission.

The PSC advised the then Permanent Secretary in charge of the Ministry to provide specific charges against the Claimant. Specific charges were drafted against the Claimant and she was issued with another letter to show cause why she should not be dismissed. She responded to the show cause letter and her matter was again placed before the Committee which upheld its earlier decision that the Claimant should be dismissed effective 10th May 2007, the date on which she was suspended. The recommendations were approved and forwarded to the PSC who directed the dismissal of the Claimant from service with effect from 10th May 2007.

The Claimant appealed against the decision but the same was dismissed. She then applied for a review of the decision which was declined. She applied for another review which was again rejected and she was informed that her case was closed. It is the Respondent's position that the Claimant triggered her own dismissal by committing the offences.

JOHN KIMANI NJURIO, the Assistant Director, Human Resource at the PSC, testified in support of the Respondent's case as RW1. He adopted his witness statement of 3rd May 2018 and the Respondent's bundle of documents as his evidence. His examination in chief was basically a reiteration of the Respondent's response outlined hereinabove.

During cross examination it was his testimony that there were allegations relating to processing of fake titles which were confirmed by the investigations carried out. He testified that the Claimant was never prosecuted but asserted that the same was not mandatory.

He testified that interdiction depended on the seriousness of the offence and the stage at which evidence became available. It was his testimony that the Claimant did not ask for an oral hearing.

On re-examination, he explained that the minutes have extracts of the investigation report.

WILLIAM KURIA WACHIRA, the Human Resource Manager and Development Officer at the Ministry of Lands and Physical Planning, testified as RW2 and adopted his witness statement dated 23rd May 2018, as his evidence.

It was his testimony that the Claimant did not perform her duties according to her appointment letter as she was not supposed to issue leases and titled deeds. He stated that investigations revealed that some entries had been made twice and others had faulty documents hence this was a clear indication that the Claimant had not performed her duties diligently as required by the Registered Land Act, Cap 300.

It was his testimony that the report by the Taskforce formed the basis for the Claimant's dismissal. He testified that the Claimant was issued with two show cause letters, one on 10th May 2007 and another on 22nd September 2009.

He contended that the first show cause letter captured the misconduct allegations which formed the basis of the claimant's suspension. The second show cause letter outlined the charges being disappearance of green cards, existence of forged leases, failure to send copies of titles to the Registrar at the Headquarters and some properties having more than one lease. He testified that the investigations revealed that the franking machines had not been working hence no stamp duty had been paid, causing the government to lose revenue

It was his testimony that due process was followed. He testified that there was no documentation clearing the Claimant. That as a consequence of the Claimant's actions, there were cases pending in Court over issuance of titles and complaints of loss of revenue.

During cross examination, he conceded that though the Claimant's employment was terminated for occasioning registration of fake documents, the total number of documents registered by the Claimant was not indicated. He conceded that the Claimant's file did not have information regarding any training of the claimant.

He contended that a hearing was not required back in 2007. He explained that investigations were only carried out after an officer responded to the show cause letter. He confirmed that no criminal proceedings had been instituted against the Claimant and admitted that the Claimant had been suspended with no except house allowance and commuter allowance.

Upon re-examination, it was his evidence that the PSC Discipline Manual came into force in 2015. He clarified that the Claimant had been suspended awaiting investigations as the complaints made against her had posed serious threats. He explained that during suspension, the Claimant was only entitled to house and commuter allowance.

The Claimant's Submissions

In her submissions filed on 2nd March 2020, the Claimant submits that since the show cause letter of 10th May 2007 was disregarded and another one issued on 22nd September 2009; the provisions of the Employment Act, particularly section 41, ought to have been complied with. She relies on a myriad of cases among them: **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR**, **Liz Ayany v Leisure Lodges Limited [2018] eKLR**, **Malachi Ochieng Pire v Rift Valley Agencies [2013] eKLR**, **Jared Aimba v Fina Bank Limited [2016] eKLR** and **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**. In the cases, the respective Courts were of the opinion that an employer has to adhere to section 41 of the Employment Act before terminating an employee's services.

The Claimant further submits that the Respondent breached the provisions of Section 45(4) and (5) of the Employment Act as it did not act in accordance with justice and equity in dismissing her from service despite the provisions of paragraphs 5 (a) , 6 (a), 9, 10 and 13 of the Public Service Commission of Kenya Discipline Manual 2008. The hearing was on account of the first show cause letter and was conducted 2 years after she had been issued with the same, she was not afforded a hearing on account of the charges raised in the second show cause letter, no proper investigations were carried out, the procedure for gathering evidence was not followed and there was insufficient evidence to guide the Committee in decision making.

The Claimant urged this Court to allow the claim and award the reliefs as prayed.

The Respondent's Submissions

In its submissions filed on 15th May 2020, the Respondent submits that it had a lawful and valid reason to dismiss the Claimant pursuant to section 44 (4) of the Employment Act for negligence of duty and committing a criminal offence and for the irregularities of registering fake documents in her position as the Assistant Land Registrar. The Respondent relies on the case of **Evans Kamadi Misango v Barclays Bank of Kenya [2015] eKLR** where it was held that the burden placed on the employer under section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the services of an employee.

The Respondent submits that the procedure adopted and which culminated into the decision to dismiss the Claimant was fair and lawful. That the Claimant was accorded an opportunity to be heard through her written defences which were considered before the decision to terminate her employment was made.

The Respondent submits that the Claimant is not entitled to any of the reliefs sought as her dismissal was fair and for a valid reason. The Respondent relies on the case of **Alice Nyanduko Omwancha v Kenya Industrial Estates Limited [2019] eKLR** and **Festus Kyalo Muthiani v Kenyatta National Hospital [2017] eKLR** where the respective Courts declined to award the Claimant the reliefs founded on section 49, for failing to prove that the termination was unlawful and for an invalid reason.

The Respondent further submits that the Claimant is not entitled to an order for reinstatement as the same is impractical and 3 years have passed since the termination of her employment, relying on the cases of **Kenneth Karisa Kasemo v Kenya Bureau of Standards [2013] eKLR** and **Alice Nyanduko Omwancha v Kenya Industries Estates Limited [Supra]** to buttress this position.

The Respondent submits that the Claimant is not entitled to future earnings and benefits as she did not render any services after her employment was terminated and relies on the case of **Kenneth Karisa Kasemo v Kenya Bureau of Standards [Supra]** to support its position.

Lastly, the Respondent submits that the Claimant is not entitled to an award of costs as she has failed to prove her case on a balance of probabilities and relies on the case of **Peter Otabong Ekisa v County Government of Busia [2017] eKLR**.

Analysis and Determination

I have carefully considered the pleadings filed in the matter, the evidence adduced and submissions filed by the parties and find the issues for determination before this Court are –

- a. The applicable law.

- b. Whether the termination of the Claimant's employment was procedural and for a valid and justifiable reason.
- c. Whether the Claimant is entitled to the reliefs sought.

Applicable law

The claimant was suspended by the letter dated 10th May 2007. This was before the Employment Act 2007 came into force. She was however issued with a second show cause letter on 22nd September 2009 after the Act came into force. Her dismissal was on 16th June 2010. The applicable law at the time of hearing of her disciplinary case was therefore the Employment Act 2007.

Termination

Section 45 (1) and (2) of the Employment Act provides as follows—

- (1) No employer shall terminate the employment of an employee unfairly.**
- (2) A termination of employment by an employer is unfair if the employer fails to prove—**
 - (a) that the reason for the termination is valid;**
 - (b) that the reason for the termination is a fair reason —**
 - (i) related to the employee's conduct, capacity or compatibility; or**
 - (ii) based on the operational requirements of the employer; and**
 - (c) that the employment was terminated in accordance with fair procedure.**

1. Reasons for the Claimant's Termination

The Claimant's summary dismissal letter of 16th June 2010, informed her that she was dismissed from service with effect from 10th May 2007 on account of gross misconduct. The letter did not elaborate what amounted to gross misconduct. The dismissal letter is reproduced below –

Ref. No. C/85087930/34

16th June 2010

Beatrice N. Khaoya

P. O. Box 620

KITALE

Dear Madam,

DISMISSAL FROM THE SERVICE

I wish to inform you that the Public Service Commission, of Kenya has decided that you be dismissed from the service with effect from 10th May 2007 on account of gross misconduct.

On dismissal, you will, have forfeited all your privileges and retirement benefits. Your final dues (if any) will be paid to you subject to production of a duly completed clearance certificate signed by the Commissioner of Lands.

I enclose herewith the official Secret Declaration of Income, Assets and Liabilities Form on leaving the government service for your completion and return to this office together with your Government ID Card for our records.

Meanwhile, you. are informed that you have a right of application for review of your case to the Public Service Commission of Kenya through this office within a period of six (6) weeks from the date of this letter.

A certificate of service will be issued to you on request.

Yours faithfully

SIGNED

G. M. MAINA

FOR- PERMANENT SECRETARY”

The letter to show cause of 22nd September 2009 to the Claimant read as follows–

“REF: C/85087930/22

22nd September 2008

Ms. Beatrice N. Khaoya

Throu’

The District Land Officer

Trans Nzoia District

P. O Box 620

KITALE

Dear Madam

RE: GROSS MISCONDUCT

Further to our letter Ref. No. C/85087930/3 dated 10th May 2007, it has further been reported that you facilitated registration of leases and issuance of titles thereto of the leases you knew were fake and deliberately failed or ignored to follow the laid down procedures of detecting the characters of a genuine lease.

You also registered parcels number Kitale/Municipality Block 5/149 and two cards are on record for this parcel. One was opened in 1999 and is in the name of Joyce Muthoni Mbugua, whereas the card that you opened in 2006 shows that the parcel now belongs to Saul Egunza Bunyali.

Enclosed herein please find a list of thirty-four (34) parcels of land for which fake titles and leases were issued. The particulars of the irregularities are as follows–

(i) Green cards were duplicated to necessitate issuance of new forged leases.

(ii) Parcel files contained forged leases purported to have been issued by land officers from the Ministry’s headquarters.

(iii) The leases were being collected by their owners from Nairobi and took them to Kitale for registration. You registered these leases without confirming whether they were genuine or not from the Headquarters. The letters forwarding the lease bore forged signatures and the file letters indicated on the letters were for other areas for example.

· File No. 242021 – Nairobi

· File No. 244412 – Nanyuki

· File No. 188642/16 – Nairobi

(iv) You did not send a copy of the lease to Headquarters after registration and the plot number on the leases are not in the Registry Index Map (R.I.M). Moreover, there are no records of the suspected leases in the Senior Plan

Records Office (SPRO)

(v) Signatures of Commissioner of Lands and Registrar on the leases were forged.

(vi) Some properties had more than one lease, for instance.

· Block 10/110 Richard Kissa Matayo and Michael Kimitai

Ndiva

· Block 8/77 James Sifuna Barasa and Municipal Council of Kitale

· Block 10/43 Wilberforce Malangai and Salim K. Omido.

As a result of the above activities this has led to high rise of court cases and land disputes among the residents of the area.

This office completes recommending your dismissal from the service on account of gross misconduct.

However, before this is done you are hereby called upon within a period of twenty one (21) days from the date of this letter to show cause why we should not proceed as anticipated.

Your representation if any should be received in this office within the stipulated period failure to which your case will be concluded without further reference to you.

Yours Faithfully

SIGNED

J. K. KANDAGOR

FOR: PERMANENT SECRETARY”

The show cause letter expounded on the reasons termination. As such, there was no doubt as to what amounted to gross misconduct, although there was no indication of which of the charges she was found guilty of.

In her response to the second show cause vide her letter of 5th October 2009, the claimant explained her position as follows: she denied facilitating the registration of leases and issuance of certificates of titles; denied registering Kitale Municipality Block 5/149 on 17th November 2006 contending that she received her appointment letter for the position of assistant land registrar on 28th November 2006 and started signing documents in December; she also denied facilitating the registration of the 34 leases referred to in the show cause letter. In her letter, she requested the permanent secretary to call the owners of the said leases and question them on how they obtained the leases and who assisted them in registration.

No evidence was adduced by the Respondent to show that the Claimant was issued with the documents that the Committee relied on while considering her case. No evidence was adduced to show that the Committee called any witness during its deliberations to confirm the allegations by the Task Force against the claimant's. Nevertheless, the Committee deliberated on the Claimant's case and only took into consideration her response, and upheld its decision of 12th November 2008 which recommended the Claimant's dismissal.

Apart from the memo of 26th August 2009 that implicated the Claimant and her colleague, the reports relied upon by the Committee were not presented before this Court to assist this Court in making sense of the leases annexed by the Claimant so as to establish whether the allegations against her were justified. Additionally, no complainants were brought before this court for examination as witnesses, nor were any specific complaints brought to the attention of the court.

Further, from the minutes of the Committee meeting held on 12th November 2008, it is observed as follows–

“The team interviewed the District Land officers, Mr. Were and it emerged that documents were being registered without being valued and stamp duty not paid. He observed this for some time and kept some green cards which had been suspiciously one fraudulently (sic) Mr. Oduor, the Land Registrar, took notes on all transaction which the team considered suspicious. He also compiled a list of all leases which had been purportedly been prepared at the Headquarters and forwarded to Kitale for registration. They were all alleged to have been signed by the Commissioner for Lands and the purpose of carrying them to Nairobi was to verify their authenticity.

They also carried to Nairobi two (2) non-serviceable stamp duty franking machines with a view of having them repaired and as evidence that documents were being registered without being stamped.

They travelled back to Nairobi... and Mr. Oduor took custody of all the documents they had carried and the two franking machines... However, Mr. Oduor was ailing and was admitted at Kenyatta National Hospital. He later passed away.

On learning of his death, he verbally discussed with the Chief Land Registrar, Mrs. T. N. Mburu on the need for looking for the documents which were in Mr. Oduor's custody with a view of having them verified by another registrar on their authenticity. It was expected that together with the draft notes left behind by the deceased a technical report could be prepared which was to form the basic and conclusion that:

iv. The Registration had irregularly been carried out.

v. The Commissioner of lands signature had been forged or;

vi. The transactions were clean.

Depending on its findings, a recommendation was to be forwarded to the Authorized Officer either absolving the officer's from blame or take disciplinary action against the officer on omission or commission arising from performance of their duties. However, due to dilly dallying on the part of the Department of Lands, a technical report was not complied ...

In the absence of the technical report it was clear and evident that no revenue was being collected as documents were registered without being stamped centrally to existing operational regulation and somebody ought to be punished."

In light of the foregoing, it is evident clear that the Committee lacked basis for finding the Claimant guilty of gross misconduct and recommending her summary dismissal. In the premises, the Respondent has failed to prove that the PSC had a valid and justifiable reason for terminating the Claimant's employment as required by sections 47(5) and 43(1) of the Employment Act 2007. The termination was therefore unfair within the meaning of section 45 of the Act.

2. The Termination Procedure Followed

The Respondent argued that in 2007, there was no requirement for a hearing. However, it is my considered view that when the findings of the Committee of 12th November 2008 were disregarded by the PSC and the second show cause letter was issued; the previous proceedings and occurrences became inconsequential.

The Claimant's second letter was issued on 22nd September 2009 while the Employment Act 2007 was in force hence the Respondent was obligated by section 41, to accord the Claimant a hearing in the presence of a colleague of her choice, and give her the opportunity to make representations before she could be summarily dismissed.

The Respondent's averments and evidence that the Committee only took the Claimant's response to the show cause letter into consideration in their decision to terminate her employment, is an admission that no hearing was conducted.

The case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** as relied upon by the Respondent and where it was observed that the hearing contemplated under section 41 is not necessarily oral but one that will be determined depending on the circumstance of each case whereby there are instances where correspondence would constitute sufficient hearing for the purpose of section 41, is distinguishable from this case. In the present case, the claimant was not involved in the hearing at all. After responding to the show cause letter no further communication was made to her. The evidence adduced by both parties shows that the Claimant had no access to any of the documents or witnesses or evidence relied upon to make the decision to summarily dismiss her. As such, the correspondences in the matter cannot be deemed to have comprised a hearing as anticipated under section 41 of the Employment Act. As such, failure to grant the Claimant a hearing was a violation of section 41 hence the termination of the Claimant's employment was procedurally unfair within the meaning of Section 45 of the Employment Act.

I thus find the dismissal of the claimant unfair both substantively and procedurally.

Reliefs Sought

The Claimant sought a declaration that her dismissal from service was unconstitutional, wrongful and unlawful. This Court therefore declares that her summary dismissal was wrongful and unlawful for failing to adhere to the provisions of the Employment Act as outlined above.

The prayer for reinstatement cannot be granted as more than 3 years have lapsed since the termination of the Claimant's employment. The claimant prayed for damages for unconstitutional, wrongful and unlawful dismissal in the alternative. The Claimant is awarded 12 months' salary as compensation for unfair termination of her employment. In granting the full compensation I have considered the Claimant's long service to the Public Service, the impracticability of recommending reinstatement and the circumstances surrounding the termination of her employment. I have further taken into account the long period of suspension without salary and the length of time taken to finalise her disciplinary case which started on 10th May 2007 to 16th June 2010 when she was dismissed from service. The Court has relied upon the pay slip annexed at page 32 of the Claimant's documents to detriment he compensation which she is awarded at **Kshs.232,680**.

The claim for future earning and benefits lacks basis in contract and in law hence shall not be awarded. Further, the Claimant cannot be awarded earnings and benefits for work not done. However, having found the termination unfair, I reduce the summary dismissal to normal termination with the result that the claimant is entitled to pension. The respondent shall facilitate the payment of the same through the relevant channels.

This Court also awards the Claimant the salary and benefits withheld from date of suspension up to the date she was summarily dismissed. From May 2007 to 10th June 2010, a period of 38 months at Kshs.15,140 basic pay, Kshs.3,500 house allowance and Kshs.750 medical allowance per month making **Kshs.736,820**. The claimant is further awarded pay in lieu of notice in the sum of **Kshs.19,390**.

The total award is Kshs.988,890 plus pension due from date of termination.

The salary arrears and pay in lieu of notice shall attract interest from the date of filing suit while compensation will attract interest from date of judgment.

The Respondent shall bear the claimant's costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF AUGUST 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE