



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

**KENYA AT NAIROBI
CAUSE NUMBER 972 OF 2013**

JOSEPH MWANGI GIOCHE.....CLAIMANT

VERSUS

GATAMAIYU DAIRY FARMER'S

COOPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

1. By memorandum of claim filed on 26th June, 2013, the claimant averred that he was employed by the respondent on 14th September, 2005 as a Manager. His monthly salary was stated as Kshs. 25,000/- inclusive of allowances.
2. In the year, 2012, there was a caretaker committee of 5 people which took over this running of the institution.
3. In October, 2012, one week before the annual general meeting, one of the board members namely Stephen Njoroge Mwicigi resigned alleging mismanagement of the Society (respondent).
4. After the annual general meeting the claimant continued working with the caretaker committee until 1st December, 2012 when he proceeded on leave for 73 days out of the 160 days of leave. The claimant was to report back to work on 1st March, 2013
5. In December, 2012 an audit firm of Kigo Njenga Associates was hired to do a forensic audit in view of the allegations of embezzlement of funds by the old board of directors and the claimant was aware the auditors presented a report on 8th February, 2012 indicating that there were no funds embezzled.
6. On 6th February, 2013 the claimant was summoned through his mobile phone by the caretaker committee to answer some audit queries. He attended at 11.00 a.m. and found the auditor from Kigo Njenga and answered the audit queries in the presence of Mr. Mwicigi and Mr. Murimi.
7. On the same day around 1 p.m. the claimant was called by Mr. Mwicigi to the Managers office where he found a lady Assistant Manager had been hired. The Assistant Manager had a letter and a delivery book. According to the claimant, he handed over the society's documents and was pushed to resign. The Assistant Manager then gave the claimant a sealed letter in a delivery book which he signed before opening the letter. When he opened the letter he found it was a dismissal letter.
8. According to the claimant the dismissal contravened the provisions of the terms and conditions of his employment.
9. The respondent in a Memorandum of response filed on 18th September, 2013 averred that the claimant was entitled to be dismissed having breached the terms of his service to the respondent and by-so doing brought the respondent to downward spiral that totally ruined its business.
10. The respondent further pleaded that the claimant was obligated by his terms of employment to go about his duties as Secretary of the Board and as Manager of the respondent with prudence of ordinary businessman in accordance with the provisions of the Co-operatives Act, the respondents' by-laws and terms of service but he refused or neglected to do so.
11. According to the respondents, the claimant was obligated among other things to diligently and prudently undertake day to day management of the respondent's business, keep proper books of account and to provide proper and honest accounting records and periodical analysis of the respondent's business.

12. The respondent further pleaded that a forensic audit by Kigo Njenga and Associates commissioned by the respondent's caretaker board unraveled the aforesaid mismanagement and malpractices which the claimant had consistently presided over. According to the respondent therefore, the termination was fair and deserved.
13. In his oral evidence in court, the claimant repeated most of the averments in the claim and additionally stated that as a manager he was in charge of day to day operations of the respondent. He further stated that he used to report to the management committee of nine people and that he used to act in the Board as Manager of the respondent. The meetings were monthly and that he would come up with issues to be implemented by the management.
14. It was further his evidence that on the day of the AGM members asked the Board members to leave the venue to allow members deliberate. Later the District Co-operative Officer told them that the members resolved to appoint a caretaker committee and that the Board had been dissolved and a caretaker committee appointed in its place. The Committee was to verify the allegation of mismanagement. He worked with the committee but at some point he found it difficult working with them so he took leave for 73 days.
15. He was later, while on leave summoned to answer audit queries. According to him the queries were not communicated to him in advance and that he never carried any documents to the meeting and further that he was never updated on the intention of the meeting. He thought it was routine work. The claimant further stated that he was not issued with any show cause letter prior to dismissal and further that there was no disciplinary hearing before the dismissal.
16. In cross-examination he stated that the society had bylaws and that he knew about cooperative business. It was further his evidence that he was a finance person. The claimant further stated that he was aware of the duty of care expected of him. It was his evidence that he was the senior most officer of the respondent and that his duty was to implement decisions of the management Board. According to him, he never dealt with receipt or cash but all departments reported to him. He further stated that it was not his responsibility to keep records but it was his duty to ensure they were kept.
17. The claimant further stated that the committee would not know if something not needed was ordered and payments were against deliveries. The payment invoices would be raised by the accountant and would thereafter be brought to his office. He denied falsifying account records.
18. The respondent's 1st witness Mr. Njenga Gathu informed the court that he was the Chairman of the respondent and that he was appointed in October, 2012 on interim basis. According to him there was an outcry that the affairs of the society were not being run well. The members wanted the old board dismantled. The society was viewed insolvent since debts had accumulated to almost 80 million shillings. One company buying milk owed the respondent about Kshs. 30 million.
19. It was further his evidence that the claimant had a responsibility to keep complete records of assets and liabilities of the respondent. He informed the court that a forensic audit was commissioned thereafter and the audit report revealed that there was mismanagement by the manager. The claimant issued cheques when there was no money to honour them. The cheques totaled to Kshs. 11 million. The overdraft was standing at 40 million as opposed to the authorized 10 million.
20. It was his evidence that the interim committee summoned the claimant and interrogated him. The auditors also questioned the claimant but he failed to provide satisfactory answers.
21. In cross-examination he stated that there was no internal auditor and that the audit was usually done by the co-operative officer. He further stated that the claimant was called back to work from leave by telephone and that the leave letter allowed one to be called back to work in case of any urgency.
22. The respondent's second witness Mr. David Munyagia Mbugi stated that he was an accountant by profession and held CPA(K). In 2012 December he was working for Kigo Njenga & Co. Certified Public Accountants. On 24th December, 2012, the respondent's board requested their firm to carry out investigative audit of the respondent's account. They were asked to do a forensic audit to establish if there was mismanagement of funds.
23. They interviewed the manager but found him uncooperative. They found there was double accounting of income in transport and fuel departments. This was to show the society was doing well while it was not. They found that there was sharp differences in debts during the period showing lack of prudence. By 2012 there was approximately 43 million shillings of uncollected debts. Most of the debt was owed by Lari Dairies. Some of the regular creditors were paid in advance.
24. It is common ground that there was an outcry over the management of the respondent's finances. It is further not disputed that at the AGM of 2012 the members voted to remove the management board and replaced it with a caretaker committee. The caretaker committee subsequently commissioned a forensic audit to establish if there was any financial mismanagement in the respondent.
25. The respondent's second witness Mr. Mbugi informed the court that indeed there was financial mismanagement of the respondent.
26. The claimant in his evidence informed the court that he was the respondent's manager overseeing the day to day affairs and that he was as a manager also the Secretary of the Board and would sit in the Board meetings. It was further his evidence that his responsibility included implementation of decisions made by the Board. The claimant further informed the court that he worked with the caretaker committee for a short while but found working with them hard and therefore he opted to proceed on 73 days of leave out of the 160 days he had accumulated. While on leave he was called back to answer some audit queries which he did and was subsequently issued with a dismissal letter.
27. Under section 43 of the Employment Act, in a claim arising out of termination of a contract, the employer shall be required to prove the

reason or reasons for that termination, and where the employer fails to do so, the termination shall be deemed to have been unfair.

28. Sub-section 2 further provides that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

29. As observed earlier in this judgment, it was common ground that there was concern over the financial management of the respondent. The claimant conceded that as a manager and secretary to the Board he was responsible for day to day management of the respondent and that he would brief the board at the Board meetings and also implement Board resolutions.

30. Financial mismanagement of the magnitude disclosed by the auditors cannot be doubted to be reasonable cause to terminate the services of an employee responsible.

31. The removal of the Board at the October, 2012 AGM and its replacement by a caretaker committee was a precursor to the removal of the claimant for there was no way as a person who briefed the Board and was responsible for implementing the Boards' decisions he could remain in office after the very Board had been dismissed by the members at the October, 2012 AGM. In the courts view therefore, there existed valid grounds for terminating the claimants' service.

32. Concerning the procedure followed in terminating the claimant's service, the court is persuaded that due process was followed. The requirement of issuance of notice to show cause and invitation to a disciplinary hearing does not have to follow a pedantic and mechanical path. Once the court is satisfied as the case here that the employee had reasonable notice of the allegations against him and he has been called upon to answer questions around those allegations and has done so, if a dismissal follows thereafter the employee cannot insist on a mechanical process of notice to show cause and a disciplinary hearing. In the court's view therefore the dismissal was procedurally fair.

33. In conclusion the court finds the claim without merit and the same is hereby dismissed save that the claimant shall be paid as follows:

- (a) Outstanding leave days Kshs. 240,371.28
- (b) Leave allowance Kshs. 46,947.60

Kshs 287,318.90

34. There will be no orders as to costs.

35. It is so ordered.

Dated at Nairobi this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge