



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 561 OF 2017

JAMES AMBUSO OMONDI.....CLAIMANT

VERSUS

MOHAMED MOULID SHURIE.....1ST RESPONDENT

WATER RESOURCES MANAGEMENT AUTHORITY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 22.03.2017 through Koceyo & Company Advocates. The claimant filed on 01.11.2017 the amended memorandum of claim through Otieno Arum & Company Advocates. The claimant prayed for judgment against the respondents for:

- a) That the Honourable Court be pleased to issue a permanent injunction restraining the respondents from breaching the contract of employment dated 17.02.2014 by subjecting the claimant to inhuman, hostile and humiliating work environment.
- b) Payment of half monthly salaries (50%) held by the 1st and 2nd respondents since December 2016 to date.
- c) Payment for 31% gratuity due to the claimant for completed contract for the period July 2014 to date.
- d) Payment of monthly gross salaries (currently stopped) for the period July 2017 to the time suit is determined.
- e) Cost of the suit.

In alternative the claimant prayed for:

- a) Payment of half monthly salaries (50%) held by the 1st and 2nd respondents since December 2016 to date.
- b) Payment of half monthly salaries (50%) held by the 1st and 2nd respondents since December 2016 to date.
- c) Payment for accrued leave.
- d) Payment of three months' salary in lieu of notice.
- e) Compensation for loss of employment for 12 months x Kshs.282, 200.00.
- f) Payment of monthly gross salaries (currently stopped) for the period July 2017 to the time suit is determined.
- g) Damages for discrimination, inhuman treatment and harsh work environment Kshs.50, 000, 000.00.
- h) Compensation for the remainder period of the contract of term renewable up to age 60 years.
- i) Cost of the suit.

j) Interest on (a) (b) (c) (d) (e) and (f) above at commercial rates of 20% from the date of filing suit till payment in full.

k) Any other and further relief that the Court may deem fit and just to grant in the circumstances.

The respondents filed the memorandum of response on 18.04.2018 through Garane and Somane Advocates. The respondents prayed that the claimant's suit should be dismissed with costs.

There is not disputed that the 2nd respondent and the claimant were in a contract of service. The claimant was employed by the 2nd respondent by the letter dated 17.10.2011 for a term of 3 years renewable and to the position of Finance and Administration Manager (FAM). The claimant successfully performed that contract and the same was renewed for a further term of 3 years around 17.02.2014 at a gross salary of Kshs.241, 758.00 per month. The 2nd contract was lapsing on 30.06.2017.

The term of the 2nd respondent's Chief Executive Officer (CEO) one Eng. Philip Olum was ending on 31.07.2016 and the 2nd respondent advertised on 08.04.2016 a vacancy in the office of the CEO. A total of 39 applications were received including 7 from the 2nd respondent's own staff one of whom was the claimant. The interviews were carried out and 4 candidates were found suitable and their names submitted to the Cabinet Secretary in the parent Ministry to approve one of the successful candidates for appointment as the CEO of the 2nd respondent. The 1st respondent was also amongst the 4 successful candidates and the Cabinet Secretary approved the 1st respondent for the appointment. The 1st respondent took over office of the 2nd respondent's CEO effective 01.08.2016.

The claimant's case is that he was the 1st respondent's immediate deputy in the 2nd respondent's establishment but upon assuming office the 1st respondent started taking drastic administrative actions that was not conducive to the claimant. The claimant pleaded and testified that for example, on the first day at work on 01.08.2016, the 1st respondent wrote a letter dated 01.08.2016 to Commandant Administration Police for deployment of 2 armed police officers for 1st respondent's security; the 1st respondent declined to sign the handover report saying that it was incomplete and the hand over report had never been signed by the 1st respondent; and he unilaterally allocated himself 3 vehicles with 2 drivers including the car which had been assigned to the claimant (and no alternative car was availed for the claimant's use.)

The claimant's further case is that on the 2nd day as CEO the 1st respondent took several other unilateral steps thus, unilaterally cancelling all staff transfers which had been implemented by the 2nd respondent across its service and which transfers had been approved by the Human Resource Department as requested for by the staff and to fill the spaces left by retiring staff; cancelling previous staff upgrading, promotions and annual salary increment; demanding to be the sole signatory to the 2nd respondent's head office 52 bank accounts but the claimant declined to cooperate in that regard advising the 1st respondent that change of signatories would require approval by the 2nd respondent's Board; unilaterally redeploying 9 support staff working with the 2nd respondent World Bank Implementation Unit Members without involving the Human Resource Department.

The claimant's further case was that on the 3rd day in office on 03.08.2016 the 1st respondent unilaterally took over the role of the Human Resource Department and transferred a junior staff being driver Shaban Ahmed Golicha from Embu Regional Office to 2nd respondent's head office ; and unilaterally directed that an SMS be issued to recently recruited staff to report to the head office and collect letters terminating their employment and without issuing letters to the staff he verbally directed them to stay away until further notice.

The claimant's further case was that the 1st respondent was acting unilaterally without having undertaken induction and orientation.

The claimant's case is that on 07.08.2016 the 1st respondent called for an urgent meeting of the 2nd respondent's Board disguised as an orientation and without tabling a board paper, the 1st respondent informed the Board that he cannot work with the claimant and requested the Board to sack the claimant. The claimant's case was that at the meeting of the Board which was held on 11.08.2016 the Board declined the request to sack the claimant without a valid reason and asked the 1st respondent to table the reasons and grounds for the request to sack the claimant.

The claimant's evidence surrounding the events leading to the present suit is as follows:

a) On 08.08.2016 the 1st respondent wrote requiring the claimant's clarification on, unremitted taxes for period January 2011 to May 2016 and corporate taxes owed were about Kshs.1.191 billion and PAYE Kshs.1.3 billion; pending payments of bills for about Kshs.500 million where cheques corresponding to prepared payment vouchers had been made; detailed report on how Kshs.100 million disbursed to the 2nd respondent by the Ministry of Water and Irrigation in July 2016 was used; and the pending disbursement for 15% WDC Funds from Water Services Trust Fund (WSTF). The claimant replied by his letter of 15.08.2016 that the 2nd respondent acknowledged by the letter dated 29.07.2016 that it owed KRA unremitted taxes due to financial difficulties; and he made clarifications on all the issues.

b) On 19.08.2016 the 1st respondent directed the claimant to proceed on 50 days' annual leave from 25.08.2016 and the directive was outside the 2nd respondent's human resource policies as the claimant had already applied for 28 leave days but the 1st respondent had not made his decision in that regard. The 1st respondent had already completed the prescribed leave form and required the claimant to simply sign but the claimant declined.

c) On 24.08.2016 the respondent served a show-cause letter upon the claimant with allegations against the claimant including allowing the 2nd respondent to incur huge debts in terms of pending bills; preparing financial statements that failed to show the 2nd respondent's true and fair view; failure to advise the 2nd respondent's Board about the financial status and matters; withholding income tax and pension contributions; failure to implement some Treasury circulars advising on prudent financial management and

austerity measures; failure to disburse 15% WDC Funds from Water Services Trust Fund (WSTF). The claimant replied by his letter dated 08.09.2016.

d) The allegations as far as the claimant's case goes were calculated to hound him out of office as they were false. For 6 years he had reported to the 2nd respondent's Board and no disciplinary issue had come up.

e) That when the claimant declined to proceed on 50 days compulsory leave, the 1st respondent on 06.09.2016 physically stormed the claimant's office with hired "fundis" and closed the claimant's office. The claimant's secretary was chased away and armed security posted at the office to prevent the claimant's entry or access.

f) The break-in to the claimant's office happened when the claimant was in a meeting with the Board Chairman in another room. The secretary informed the claimant about the happenings and the Chairman advised the claimant to stay away for some time as the chairperson resolved the issues. The claimant's case was that it was humiliating, embarrassing and degrading for the 1st respondent to treat the claimant in such manner. The claimant's further evidence was that the closure of the office and posting of security personnel to block his entry on 06.09.2016 effectively blocked him from discharging his duties.

g) In further harassment, the 1st respondent served upon the claimant a 2nd show-cause letter dated 15.11.2016 alleging that the claimant had been absent from duty without lawful cause. The claimant's testimony was that such allegation was unfounded but he replied by his letter dated 23.11.2016 that he had been discharging his duties until he was blocked from accessing the office on 06.09.2016.

h) The 1st respondent served upon the claimant the letter of interdiction dated 28.11.2016 attaching an audit report dated 23.11.2016 and requiring the claimant to answer about, fraudulent payment of Kshs.96, 647, 787.00 to various suppliers for goods that were not delivered and services not rendered; unauthorised misallocation of Kshs. 27, 979, 380.00 meant for drilling of three boreholes in Wajir County; making payments of Kshs.10, 570, 470.00 without following required procurement procedure; and the claimant's failure to pay statutory deductions amounting to Kshs. 1, 746, 451, 500.00 as at 30.06.2016 without the Board's knowledge or approval. The claimant's position and case was that the allegations were not true and the audit report had not referred to him at all.

i) The numerous show-cause letters were served but the allegations have never been determined in the prescribed disciplinary procedure. The claimant concludes that the numerous show-cause letters aimed at the 1st respondent finding a chance to terminate the claimant's employment. Further the contract of service with the 2nd respondent was for 3 years renewable until attaining the age of 60 years and the 1st respondent's actions are to deny the claimant that renewal.

The claimant admitted receiving the 2nd respondent's letter dated 06.06.2017 informing the claimant that the Board's Finance and Support Services Committee had scheduled a Special Committee meeting on 16.06.2017 to adjudicate on various audit queries raised against the claimant and the claimant had not answered satisfactorily. The claimant was invited to appear on Friday 16.06.2017 at 10.30am at the 2nd respondent's Boardroom at NHIF building, 9th floor. The claimant further testified that he replied that letter and indicated to the Board that the matters were before the Court and the Board concurred and the hearing never took place. The claimant further testified that under the 2nd respondent's policies the 1st respondent as the CEO had to recommend the renewal of the ending contract of service to the Board and that was not done in the claimant's case. Further it was the claimant's duty to apply for renewal but he never applied for such renewal. Further the renewal of his contract was at the discretion of the Board on the advice of the CEO. Further, the claimant confirmed that he was interdicted on 28.11.2016 for one month and the policies provided for a maximum of 2 months and he had filed the suit long after lapsing of the interdiction period.

The respondents' case was that the claimant was on a 3 years' fixed term contract which lapsed on 30.06.2017. The claimant never applied for renewal. On 16.06.2017 he was invited to discuss the renewal but he replied that the matter was in court and so his services lapsed on 30.06.2017 per contract. The respondents' further case was that the interdiction was lawful as it was to allow for investigations into the allegations that had been levelled against the claimant.

The 1st respondent testified that he was competitively recruited and appointed the CEO for 2nd respondent effective 01.08.2016 when he reported on duty. He noted that there were many pending bills that the 2nd respondent had not paid. The Board met on 15.08.2016 and the problems on bills and failure to deduct statutory dues for staff were noted to go back to 2011 when the claimant was appointed to head the finance docket. Technical departments had no problem in handing over but the Finance department had many problems. The 1st respondent testified that for example the claimant handed to him 200 -300 cheques that had been drawn but not paid. The 1st respondent took the view that there had been no good reason not to meet institutional financial obligations especially as related to staff statutory deductions and PAYE. The Board then approved all disciplinary decisions against the claimant including the interdiction. The 1st respondent testified that the claimant was invited to discuss the issues by the letter dated 6.06.2017 but he declined stating that the matter was in court. The claimant's contract of service then lapsed on 30.06.2017. The 1st respondent testified that there was no entitlement for the claimant to work up to the age of 60 years and the contract of service had lapsed because the claimant had failed to comply with the procedure on renewal of the contract.

The 1st respondent testified that he never kicked the claimant out of office and never blocked the claimant from accessing the office – which office had remained locked till after 30.06.2017 when the claimant's contract lapsed and the claimant had not handed over. The 1st respondent confirmed that the claimant was entitled to half salaries withheld during interdiction period from 28.11.2016 to 30.06.2017 when the contract lapsed; gratuity for contract period as fixed in the contract of service; and pay for accrued leave days. The 1st respondent further testified that he was not fighting the claimant but he was simply performing his official duties and he never discriminated or harassed the claimant and there was no inhuman treatment. He further testified that the claimant could not be paid up to the date of judgment because the contract had lapsed on 30.06.2017.

The Court has considered the material on record, the pleadings, the evidence and submissions filed for the parties. The Court makes findings on the matters in dispute as follows.

The **1st issue** for determination is whether the 1st respondent subjected the claimant to inhuman treatment, harassment and intimidation or discrimination. The claimant's case is that he was locked out of office and security personnel placed at the door to prevent his entry. His evidence was that the 1st respondent arrived with "**fundis**", changed the locks to his office and stationed the security personnel to keep the claimant away. The claimant testified that he was informed all those proceedings at his office by his secretary on phone as the claimant met the Board chairman in another room. The claimant further testified that the chairman advised him to stay away as the chairman took time to resolve the issues. The Court finds that the claimant's evidence is trapped by the rule against hearsay evidence. He relies on alleged information by his secretary and who was not a witness at the trial. The consequence is that the claimant never actually experienced the alleged inhuman treatment, harassment and intimidation or discrimination on account of the alleged locking and stationing security personnel at the office. The Court finds that breach of rights and alleged inhuman treatment, harassment and intimidation or discrimination has not therefore been established on a balance of probability. In any event the Court further returns that the claimant offered no evidence of further steps in resolving the issues in line with the alleged promise by the Board Chairperson to resolve the issues. Further the Court returns that therefore, there is no material placed before the Court to discredit the 1st respondent's evidence that at all material time he was not fighting the claimant but he was simply discharging his official duties.

In the present case the Court finds that there was no evidence establishing that the 1st respondent had acted unprofessionally towards bringing the claimant down like was the case against the supervisor in **Vicky Kemunto Ocharo –Versus- The Independent Policing Oversight Authority [2018]eKLR**, where the Court stated thus, "**....On the other hand, it is disturbing that the incoming Head of Human Resource had told the Committee at the meeting of 28.03.2018 thus, "Ms. Ochira further reported that during her first week, Mr. Leo Boy Julians confided in her with regard to the difficulties he underwent under the leadership of Vicky Ocharo, whereby he felt disrespected. She was also advised by another member of staff that she needed a lot of prayers and grace to deal with the staff in the department" There are no reports by the said Leo Boy on record about the allegations in the quotation and it therefore appears that the officer had gone out of way to engaged in gossip against the claimant. The Court finds that such conduct fell short of professional delivery of public service. The Court considers that it must discourage public officers from engaging in such unprofessional conduct after conclusion of recruitment, selection and appointment or promotional decisions and any such unprofessional conduct would not be allowed to occasion a public officer's dismissal after the officer's consistent and long investment in capacity building and as was the case in the present matter. Such are circumstances that the Court considers to be exceptional so as to justify a reinstatement. The Court considers that public officers already in service must cooperate with their new supervisors in line with promotional and appointment decisions and newly appointed supervisors must seek to amicably take over office without antagonising those working under them even in circumstances whereby they were competitors during the recruitment, selection and appointment or promotion process. It is also that the claimant appears to have been angry and sad about the outcome of her participation in the process of filling of the vacancy of the Head of Human Capital. The Court's view is that the two officers must remain professional and continue in service in accordance with the ethos and clearly settled provisions on good public service delivery. Taking the findings into account, the Court finds that there was no evidence, as urged for the respondent, that the employer-employee relationship had irretrievably broken down but the evidence was that the parties had a problem managing the transition after a new Head of Human Capital was appointed - a scenario that the Court must discourage from recurring in our public service."**

The Court has found that the claimant has failed to establish discrimination and inhuman treatment and the prayer for general damages in that regard will also fail as not justified.

To answer the **2nd issue** for determination, the Court returns that the claimant's contract of service was a three year contract renewable. The undisputed evidence is that the claimant did not comply with the procedure for renewal being applying to the CEO who then would make a recommendation to the Board to consider making a decision on the renewal. Accordingly the Court finds that the contract lapsed on 30.06.2017 by effluxion of the contractual time. The Court returns that in such circumstances claims of unfair termination were unfounded. The Court finds that upon interdiction on 28.11.2016 the claimant subsequently moved to Court and when invited for consideration of the pending disciplinary case and issues on 16.06.2017, he replied that the matter was before the Court. In that regard the Court finds that the ***doctrine of res subjudice*** was properly invoked and by that reason the parties took the view that the matter would be determined by the Court. The Court finds that the claimant is thereby stopped from turning around and saying that the interdiction ran beyond the 2 months in the policy. The Court finds that by reason of the pending case the interdiction period was thereby modified by the parties' mutual conduct until the Court decided the case. Further, the Court returns that the claimant would be entitled **to half salaries withheld during interdiction period from 28.11.2016 to 30.06.2017 when the contract lapsed; gratuity for contract period as fixed in the contract of service ending on 30.06.2017; and pay for accrued leave days** – and as per evidence by the 1st respondent.

Thus, there being no unfair termination established, the Court returns that all other remedies as prayed for and flowing from the alleged unfair termination will collapse.

The Court follows the holding in **Amatsi Water Services Company Limited –Versus- Francis Shire Chahchi [2018]eKLR** where the Court of Appeal upheld **National Water Conservation & Pipeline Corporation –Versus- Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014 (UR)**, that the general principle is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. Again in **Bernard Wanjohi Muriuki –Versus- Kirinyaga Water and Sanitation Company Limited & Another [2012]eKLR**, Rika J held that there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed.

The Court finds that indeed in the present case the claimant's contract of service lapsed on 30.06.2017, automatically so, with the ending of the 3 years of the contractual tenure and unfair termination never attached.

There being no any other issue for determination and considering the parties' margins of success, the 2nd respondent will pay the claimant 50 % of the costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the 2nd respondent for:

a) the 2nd respondent to pay the claimant **half salaries withheld during interdiction period from 28.11.2016 to 30.06.2017, when the contract lapsed; gratuity at contractual rate for contract period as fixed in the contract of service ending on 30.06.2017; and pay for accrued leave days** – and to pay by 01.09.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment; and

b) the respondent to pay the claimant's **50% of the costs** of the suit.

Signed, dated and delivered in court at Nairobi this Friday 28th June, 2019.

BYRAM ONGAYA

JUDGE