



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1236 OF 2013

NASIEKU TARAYIA

CLAIMANT

v

AGRICULTURAL FINANCE CORPORATION RESPONDENT

JUDGMENT

1. Nasieku Tarayia (Claimant) was employed by Agricultural Finance Corporation (Respondent) as a Legal Officer on 3 January 1989. By the time of separation on 24 November 2010, the Claimant had risen to the position of Deputy Managing Director (she had acted as Managing Director in 2003).

2. On 6 August 2013, the Claimant instituted legal proceedings against the Respondent alleging unfair termination of employment, discrimination and breach of contract.

3. In a *Statement of Defence* filed on 16 January 2014, the Respondent contended that the termination of the Claimant's employment was fair and was on account of lack of confidence and serious misconduct.

4. The Cause was heard on 11 July 2018, 23 October 2018, 24 January 2019, 12 February 2019, 27 March 2019, 9 July 2019 and 10 July 2019.

5. The Claimant and the Respondent's General Manager, Human Resources and Administration and Chief Manager, Legal Services/Corporation Secretary testified. The parties also relied on filed witness statements and documents (which were admitted as bundles due to their voluminous nature).

6. The Claimant filed her submissions on 21 August 2019 (should have been filed by 9 August 2019) while the Respondent filed its submissions on 3 October 2019.

7. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Whether the Claimant was discriminated against

8. The Claimant contended that she was subjected to discrimination during the course of employment.

9. To demonstrate the discrimination, the Claimant asserted that though she was at some point the Deputy Managing Director, the Respondent conducted a sham restructuring exercise and designated her as General Manager, Business Development.

10. The Claimant also alleged discrimination on the grounds that she was stripped of responsibilities as corporation secretary and head of legal services.

11. It was not disputed that the Claimant had been appointed as Deputy Managing Director by the Minister for Agriculture.

12. In so far as the Respondent's Board was not involved in the appointment of the Claimant as Deputy Managing Director and considering that the position of Deputy Managing Director did not exist within the Respondent's formal establishment, and without the Claimant proving that the Minister could bypass the Board and the law establishing the Respondent, the Court is unable to find that there was no discrimination.

Unfair termination of employment

Procedural fairness

13. Sections 35(1)(c), 41 and 47(5) of the Employment Act, 2007 prescribe the processes an employer should comply with in order to meet the procedural fairness test.

14. Section 35(1)(c) of the Act prescribes *written notice of termination of employment* at least 28 days in advance if the employee is paid by the month while section 41 thereof contemplates a hearing. Depending on the circumstances, the hearing could be through correspondence or oral, or a combination of both.

15. In the view of the Court, Sections 35(1) and 41 of the Employment Act, 2007, are the anchors to what is loosely referred to as *show cause notice/letter*.

16. Section 47(5) of the Act provides for the initial burden of proof on the employee before the burden shifts to the employer.

17. The statutory provisions referred to above set out the minimum standards that the employer should comply with but where an employer has its own disciplinary procedures setting out higher or better protections, they should be strictly complied with.

18. The Respondent had a *Staff Policy and Regulations Manual* which provided for disciplinary procedures.

19. The Claimant was interdicted through a letter dated 4 June 2009. Apart from indicating that the reason for the interdiction was an investigation report from the Efficiency Monitoring Unit, no particulars were outlined against the Claimant.

20. On 2 September 2009, the Respondent issued a letter to the Claimant asking her to submit written explanations to some 2 allegations before 4 September 2009.

21. In a nutshell, the allegations against the Claimant were first, *failing to provide legal advice and guidance to the Management and the Board on the disposal of Eldoret View plots* and two, *concealing information from the Board regarding a loan offer made by a debtor and thus not acting in the best interest of the Respondent*).

22. The Claimant responded through a detailed letter dated 3 September 2009.

23. In Court, the Claimant impugned the process leading to her dismissal on the grounds that she was not served with a copy of the investigation report by the Efficiency Monitoring Unit at all up to the time of termination of employment.

24. The Court has looked at the Respondent's Disciplinary Code. It provided for preliminary investigations which included discussions with the employee; issuance and allowing an employee 7 days to respond to the show cause; established a Disciplinary Committee with a right reserved to an employee to appear before the Committee; suspension of up to 3 months and interdiction; right of appeal and right to appear before an Appeals Committee.

25. In the instant case, the Claimant was notified of the allegations to confront but was given only less than 2 days to respond.

26. The Claimant was then called to appear before a Disciplinary Committee of the Board on 8 September 2009.

27. It was not denied that the Claimant was not furnished with a copy of the report which formed the basis of the disciplinary process or that the Claimant was not afforded at least 7 days to respond to the show cause.

28. The Claimant was a senior manager with the Respondent.

29. Considering the lapses listed in paragraph 22 above and that the Claimant was a senior member of the management team, the Court finds that the process as carried out by the Respondent fell short of the contractual and statutory requirements on procedural fairness.

Substantive fairness

30. Having concluded that the Respondent failed the procedural fairness test, it is not necessary for the Court to examine whether the Respondent satisfied the burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

31. However, the Court will examine whether the Respondent discharged the burden expected of it by the aforesaid provisions of law.

32. The allegations which precipitated the termination of the Claimant's employment and which the Respondent was expected to not only prove but prove as valid and fair were *failing to provide legal advice and guidance to the Management and the Board on the disposal of Eldoret View plots*; and *concealing information from the Board regarding a loan offer made by a debtor and thus not acting in the best interest of the Respondent*.

Failure to offer advice on Elgon View plots tender

33. The Claimant testified that the responsibility to offer advice on the sale of the Elgon View plots rested with the Tender Committee under the supervision of the Head of Human Resources.
34. She also testified that at the relevant period (from 15 February 2006 – 13 April 2006) she had ceased being the acting Managing Director or head of legal services having been stripped of the responsibilities through a letter dated 10 March 2006, and was thus not privy to Board deliberations.
35. The Claimant further testified that the Managing Director at the time oversaw the sale of the Elgon View plots.
36. The Claimant testified that on 27 April 2007, she was informed that the Board had cancelled the tender over the plots and was only asked to provide a legal opinion at that stage.
37. The Respondent's 2 witnesses did not advert in their filed witness statements as to how the Claimant failed to provide legal advice to the Board. There was no disclosure as to when the advice was sought and how it was sought.
38. During oral testimony, the Respondent's first witness admitted that he was a member of the Tender Committee which oversaw the sale of the Elgon View plots. He also admitted that he received a warning letter over his role in the tender and that the Board had exonerated the Claimant during its meeting of 12 June 2007.
39. There was no direct rebuttal of the Claimant's testimony that she had no control over procurement and legal departments during the sale of the Eldoret View plots, or that she was not a member of the Board.
40. The report from the Efficiency Monitoring Unit also did not finger the Claimant as having been directly involved in the tender for the disposal of the Eldoret Elgon View plots. All she did was table a legal opinion from the Respondent's outside legal counsel before the Board.
41. If the Board ever sought the advice or opinion of the Claimant on the tender for disposal of the Eldoret Elgon View plots, it was not disclosed how such advice or opinion was sought. It is left to speculation whether the advice was formally sought in writing or by asking the Claimant to make presentations before the Board. The Claimant's role appears to have been the giving of *ex-post facto* advice, if at all.
42. The Respondent did not prove that it asked for and that the Claimant failed to provide advice over the tender for the sale of the Eldoret Elgon View plots.
43. The Court finds that this was not a valid or fair reason to terminate the contract.

Concealment of information

44. The Respondent alleged that the Claimant concealed information about an offer to settle a loan of Kshs 70,000,000/- until about 15 May 2009 after the debtor had been offered an interest concession of Kshs 36,600,000/-.
45. The Claimant's assertion was that she was the person who blew the whistle by querying the concession during a meeting of the Credit and Risk Committee of the Board.
46. She also stated that she was not the Corporation Secretary at the material time.
47. A journey through the records produced in Court would be invaluable in determining whether the Claimant concealed information from the Board.
48. The Respondent's advocate wrote to the Managing Director (for the attention of the Claimant) on 2 July 2007 raising concerns about purported negotiations being done behind their backs.
49. In a reply dated 5 July 2007, the Claimant confirmed that there were no such negotiations.
50. However, the Respondent's advocate wrote again to the Managing Director (for attention of Claimant) around 19 September 2007 enclosing a letter from the debtor's advocate dated 10 September 2007 in which the debtor had proposed to dispose of the mortgaged property by private treaty, and settle the debt of Kshs 70,000,000/- in full and final settlement.
51. The Respondent's advocate was seeking instructions on how to respond to the proposal.
52. A copy of the aforesaid letter produced in Court shows that the office of the Respondent's Managing Director (and not the Claimant) received and stamped the letter in acknowledgment (on 20 September 2007).
53. A minute of 20 September 2007 in the letter indicates that the Managing Director instructed the Claimant to respond to the advocates giving a condition that the debtor had to withdraw a pending case in Court before any negotiations could be entered into. Another minute in the letter shows that it was forwarded to the Legal Department.
54. If the Respondent (through the Claimant or Legal Department) replied to its advocate, a copy was not produced in Court.

55. The next letter produced in respect of the loan was again from the Respondent's advocate. It was dated 18 February 2008 and was addressed to the Managing Director (attention R. A. Ochanda) and indicated that the debtor had had a lengthy telephone conversation with the Respondent's Managing Director (and other direct engagements with the Managing Director). The advocates sought for instructions.

56. On or around 2 April 2008, the debtor's advocates wrote directly to the Respondent's Managing Director seeking a waiver of interest and proposing to pay Kshs 28,370,000/- on full and final settlement.

57. The Respondent did not respond and the debtor's advocate sent a reminder on 22 April 2008.

58. The Court has considered the material placed before it in respect of this second allegation against the Claimant.

59. There is documentary evidence that the Claimant, in a formal communication to the Respondent's advocates denied being aware of any negotiations with the debtor.

60. Nevertheless, there is ample documentary evidence that the debtor and his advocate were in both informal and formal engagements with the Respondent's Managing Director on the waiver of a part of the due debt of Kshs 70,000,000/- and which engagements the Claimant was not privy to.

61. Not having been privy to the negotiations/engagements, the Claimant cannot be accused of having concealed information from the Respondent or its Board, and the Court so finds.

62. The Claimant contended that her removal from the Respondent was a well-orchestrated plan.

63. Without delving into the details as emerged from the evidence because the Court has already found that the reasons given for the termination of the Claimant's employment were not valid or fair, the Court is inclined to agree with the Claimant that she was hounded out of office by a cartel which was uncomfortable with her working with the Respondent.

Appropriate remedies

Reinstatement

64. More than 3 years have elapsed since the separation between the Claimant and the Respondent, and the Court is therefore of the view, in line with the statutory prescription that reinstatement would not be an appropriate remedy.

Pay in lieu of notice

65. In terms of the Claimant's contract, termination was upon 3 months' notice or pay in lieu of notice.

66. The Claimant computed the 3 months' pay in lieu of notice as Kshs 1,058,250/- but using the gross salary.

67. The Respondent had offered Kshs 936,000/- but pegged it on a monthly salary of Kshs 312,000/-.

68. *Pay in lieu of notice* is ordinarily computed using basic salary, and the Court will, therefore, allow *pay in lieu of notice* in the sum of Kshs 936, 000/- as computed by the Respondent.

Severance pay

69. Severance pay is an entitlement in cases of redundancy.

70. The Claimant sought Kshs 8,466,000/- as *severance pay* for what she termed 8 years of remaining service.

71. As already observed, *severance pay* is an entitlement in cases of redundancy, and the computation is founded upon years actually served, and not years to retirement.

72. The Claimant did not prove to the required standard that her case was one of redundancy, or that there was any contractual or legal basis for payment of *severance pay* for unserved part of the contract.

Golden handshake

73. The Claimant's employment was not terminated on account of a voluntary retirement programme the Respondent had carried out earlier.

74. The Claimant also did not prove that there was comity of minds during negotiations that she would be paid a *golden handshake*.

Relocation allowance

75. The Claimant sought Kshs 40,000/- as a relocation allowance in terms of the contract.

76. An extract of the Respondent's Staff Policy and Regulations Manual filed in Court show that Clause 6.10.5 provided for transfer/relocation allowance. However, the full text of the clause was not filed and therefore the Court is unable to determine whether relocation allowance was payable under the circumstances in the Claimant's case.

Pension fund contributions

77. The Claimant sought both her own and the Respondent's contributions towards a pension scheme, together with interest which she calculated as Kshs 327,440/- and Kshs 676,045/- respectively, totalling Kshs 1,003,045/-.

78. The Respondent had indicated in the letter of termination that the Claimant was owed Kshs 1,063,485/- on account of defined contribution scheme.

79. The Court will allow the head of claim as offered by the Respondent.

Additional voluntary contribution

80. The Claimant pleaded that she was entitled to Kshs 60,000/- as an additional voluntary contribution for March to June 2008.

81. This head of the claim was anchored on a dummy computation of terminal dues, but in regard to which there was no agreement of minds.

82. Further, this head of claim was in the nature of special damage. The Claimant did not prove it to the requisite standard and it is declined.

Surrender value

83. The Respondent offered the Claimant Kshs 3,116,011/20 as surrender value. The Claimant sought Kshs 3,350,825/80 but did not disclose the formula she used.

84. An employer would ordinarily be best placed to compute such entitlements and therefore, the Court will allow the head of claim as calculated by the Respondent.

Accrued leave

85. On account of accrued leave, the Claimant sought Kshs 595,933/55.

86. The Respondent, in the letter informing the Claimant of the termination of employment, offered the same and it is allowed.

Compensation

87. The Claimant served the Respondent for about 21 years and in consideration of the length of service and the finding on the circumstances surrounding the separation, the Court is of the view that compensation equivalent to 12 months gross salary would be fair (gross salary as of December 2007 was Kshs 352,000/-).

Conclusion and Orders

88. The Court finds and declares that the termination of the Claimant's employment was unfair and awards her

(a) Pay in lieu of notice	Kshs 936,000/-
(b) Unpaid salaries	Kshs 2,268,000/-
(c) Pension funds contribution	Kshs 1,063,485/-
(d) Surrender Value	Kshs 3,116,011/20
(e) Accrued leave	Kshs 595,933/55
(f) Compensation	Kshs 4,224,000/-
TOTAL	Kshs 12,203,429/75

89. The award to be subject to statutory deductions.

90. Claimant filed her submissions long after the agreed timelines. No explanation was tendered for the delay. She is denied costs.

Delivered, signed and dated in Nairobi on this 8th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Obura instructed by Obura Mbeche & Co. Advocates

For Respondent Mr Nyandieka instructed by Nyandieka & Associates Advocates

Court Assistant Lindsey