



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 482 OF 2016

JOHN OKIRO MISIGA.....CLAIMANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. This Claim is about an alleged unfair and unlawful termination of the Claimant's employment by the Respondent and failure to pay his terminal dues. The facts of the case are that the claimant was employed by the National Treasury on permanent and pensionable terms. By letter dated 15.10.2013, he was transferred to the respondent in the same position he held at the National Treasury.

2. After the transfer, the Claimant was issued with a contract letter dated 28th October, 2013 appointing him to the position of Assistant Director, Finance and Administration at Job Grade NLC 3 for five years with effect from 4th October, 2013 with an option of renewal subject to performance. His monthly salary was Kshs.206,130/- and a maximum of Kshs.297,750 plus gratuity calculated at the rate of 31% of his monthly salary at the end of contract. Accordingly, he was allocated a Personal Number by the respondent being NLC 20140067.

3. On 25.7.2014, the claimant wrote a letter to the National Treasury requesting for an early retirement under the 50-Year Rule and the same was accepted with direction that it was to take effect on 1.9.2014. Subsequently the respondent wrote the letter dated 14.8.2015 to the National Treasury conveying her decision to post the claimant back to the National Treasury with effect from 1.9.2015. The Claimant construed the decision by the respondent to amount to an unlawful and unfair termination his contract of service before the due time. He therefore brought this suit seeking the following reliefs:

- a) A declaration that the Claimant's termination of employment was unfair and unlawful.
- b) The Claimant be paid compensation for the anguish and financial instability caused by the abrupt termination of the Claimant's employment.
- c) The Respondent be ordered to pay the Claimant his terminal benefits as set out in paragraph 18 herein above totalling to Kshs.15,943,688/=.
- d) This Honourable Court do issue such orders and directions as it may deem fit and just for the

ends of justice.

e) The Respondent be ordered to issue the Claimant with a certificate of service as provided for by Section 51 of the Employment Act, 2007.

f) Interest on the above at Court rates.

4. The Respondent denied the alleged unfair and unlawful termination of the claimant's employment and averred that she only posted him back to his principal employer. She further averred that the Claimant was seconded to her from the National Treasury on a temporary basis as she was setting up her structures and recruiting her own staff. She further contended that the Claimant's terms of service was for a period of five (5) years just as all other staff on secondment, but he was to remain an employee of the National Treasury. She stated that the Number NLC 20140067 issued to the Claimant was for purposes of identification and that appointment letters and contracts were issued to all staff including new and seconded staff from the civil service in line with the law and the same should not be perceived as proof of permanent employment with the Respondent. She therefore prayed that the suit be dismissed with Costs to the Respondent.

5. The main issues for determination are whether the Claimant was employed the Respondent after being seconded to her by the National Treasury, and if so, whether the Claimant the subsequent employment was constructively and unfairly terminated by the respondent in the disguise of posting him back to the National Treasury. To answer the said questions, both parties tendered evidence and thereafter filed and exchanged their written submissions to the Claim.

Claimant's Case.

6. The Claimant testified as CW1 and basically adopted his witness statement dated 23rd November, 2018 and produced supporting documents 1 to 12 attached to the Statement as his evidence in chief. He stated that on 14.8.2015 after leaving the office, was called by the Secretary to the CEO to collect his letter but he collected it on 17/8/2015 after the weekend. The letter was informing him of his transfer back to National Treasury with effect to 1.9.2015. He contended that the letter in effect terminated his services disguised as a transfer. He appealed against the decision but the appeal was dismissed. Finally, he stated that the premature termination of his five years contract was unfair he was not accorded a prior fair hearing and as such urged this Court to allow his Claim as prayed.

7. In cross examination, he admitted that he was seconded to the Respondent from the National Treasury to assist the commission to establish its structures and procedures. He contended that when the respondent advertised the post of Assistant Director, he applied successfully for the same and upon getting appointed, he applied for early retirement from the National Treasury under the 50 years Rule via his letter dated 25/7/2014. He stated that after his transfer to the Respondent he worked for 2 years before he was constructively dismissed. He maintained that the termination was unfair because he was not called by the Respondent to know whether he was willing to go back to the National Treasury.

Defence Case.

8. Mr. Ben Bett, The Acting Director, Human Resources for the Respondent testified as RW1. He similarly adopted his Witness Statement dated 6th December, 2018 and supporting documents filed on 4th December, 2018 and 16th January, 2019 as his evidence. In brief he stated that the Claimant's principal employer was the National Treasury but was transferred on temporary basis to the Commission. He further stated that the Claimant's salary was initially paid by the National Treasury prior to NLC putting its structures in place but thereafter the Claimant's salary was paid by the Respondent herein.

9. RW1 further stated that all staff including those on secondment were issued with letters of appointment in strict compliance with the law. He denied that the Claimant was dismissed as alleged and contended that he was posted back to his parent employer, the National Treasury. He further contended that the Claimant cleared with the Respondent and he was paid all his dues at the time of transfer back to the

National Treasury. Finally, he stated that the Claimant was issued with a certificate of service for the duration he worked for the Respondent and prayed this Court to dismiss the suit for lack of merit.

10. In cross examination, RW1 admitted that he joined the Respondent after the claimant left the commission. RW1 denied knowledge of any application for employment made by the Claimant but admitted that the Claimant was on a five (5) year contract given by the respondent after his secondment from the National Treasury. He maintained that the Claimant was not dismissed but rather transferred back to his primary employer. He however admitted that he did not sit in any meeting to discuss termination of the Claimant's services.

Submissions by the Parties

11. The Claimant submitted that after the transfer to the respondent from the National Treasury, he subsequently applied for the position of Deputy Director Finance and Administration after the respondent advertised the same, and he was appointed and issued with a contract of employment by Respondent herein. In his view therefore, he became substantive employee of the respondent. He relied on **Public Service Commission Vs County Government of Bomet (2016) eKLR**, **David Barasa Vs British Peace Support Team & Another (2016 eKLR)** and **Rev. John Mugania Vs Kenya Methodist University & Another Cause No, 133 of 2013** for emphasis.

12. He further submitted that the Respondent's actions of purporting to send the Claimant back to the National Treasury without according him a fair hearing was contrary to the provisions of Section 10 (5) of the Employment Act, 2007 because it amounted a unilateral variation of his contract of service. That the said unilateral changes in his contract by the respondent were detrimental to him and amounted to constructive dismissal. He relied on the case of **A.M Msagha Vs Chief Justice of Kenya & 7 Others (2006)eKLR** and **Henry Ochido Vs NGO Co-ordination Board (2015)eKLR** for emphasis.

13. The Claimant further submitted that the termination of his employment by the respondent was unlawful and unfair and was contrary to the mandatory provisions of Sections 35, 41, 43 and 45 of the Employment Act, 2007. To buttress his argument the Claimant relied on the cases of **Aviation and Allied Workers Union Versus Kenya Airways Limited and 3 Others [.....]e KLR** and **National Union of Metal Workers of S.A Vs Vetsak Co-operation Ltd and Others, 1996 (4) SA 577 (A)**.

14. The Claimant further submitted, in view of the unfair termination of his employment, he is entitled to the reliefs as sought in his Memorandum of Claim and urged this Court to allow the same as prayed. For emphasis he relied on **Stanely Kaunga Nkarichia Vs Meru Teachers College & Another (2016)eKLR** and **Highlands Water Company Limited Vs Purity Wambui Muriithi (2016)eKLR**.

Respondent's Submissions

15. The Respondent submitted that the Claimant's secondment to her did not take away the fact that he was a permanent and pensionable employee of the National Treasury. To fortify that view, she relied on the Section 23 of the National Land Commission Act, No. 5 of 2012. She further contended that the Claimant's claim for unfair termination of employment is untenable. She contended that the instant suit is distinguishable from **David Barasa Vs British Peace Support Team & Another (2014)** and **Rev. John Mugania Vs Kenya Methodist University & Prof. Mutuma Mugambi, Cause No. 133 of 2012** which were relied upon by the Claimant to advance the argument that he resigned from the National Treasury to take up permanent employment at the commission. She submitted that as at the time of the application for retirement, he had already been issued with the appointment letter in October 2013 and no other was given to her thereafter by the Respondent.

16. She maintained that the claimant remained an employee of the National Treasury and positing him back there did not amount to unlawful termination. For emphasis she relied on **Naim Bilal Yaseen Vs Judicial Service Commission (2017)eKLR**, **Ng Ching Yoon & Others Vs A. & W Malaysia Sdn Bhd (2005) 3ILR 306**, **Bank Simpanan National Finance Bhd & Another Vs Omar Hashim (2002) 1 ILR 272**, **Mbatha Vs University of Zululand (45/13) (2013) ZACC 43;2014 (2) BCLR 123 (CC); (2014) 35**

ILJ 349 (CC); (2014) 4 BLLR 307 (CC), Peter Mafunda Vs Zimbabwe Energy Regulatory Authority, Civil Appeal No. SC 134/15 and Mahasin Elbashir Abdalla Vs Libya Oil Kenya Ltd (2012)eKLR.

17. The Respondent further submitted that Constructive Dismissal does not arise in the instant Claim as alleged by the Claimant herein because all what she was to post him back to his principal employer. she sought to distinguish the case of *Henry Ochido Vs NGO Coordination Board (2015)eKLR* relied on by the Claimant and the facts of his case by stating that in the said decision the Claimant was challenging a decision of his principal employer, yet in his case the Claimant was not at any time transferred by his parent employer.

18. The Respondent submitted that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim as what she did was post him back to his parent employer. He further submitted that the posting was fair and that the Claimant was paid all his dues as provided under his Contract, which was fact was not controverted at the trial. she contended that the claim for underpayment was not supported by evidence and therefore ought to be dismissed. Finally, she submitted the Claimant is not entitled to costs of the suit because he never served demand letter before filing this suit. She relied on *Morgan Air Cargo Limited Vs Everest Enterprises Limited (2014)eKLR* for emphasis.

Analysis and Determination

19. There is no dispute that the Claimant was employed on a permanent and pensionable basis by the National Treasury. It is further not in dispute that he was transferred to work with the Respondent commission on 30th September, 2013 and that he reported to work on 4th November, 2013 in the capacity of Assistant Director Finance & Administration. It is also not in dispute that the Claimant was engaged by the Respondent on a five year contract period starting 4th October, 2013 and was scheduled to lapse on or about 4th October, 2018 pursuant Appointment letter dated 28th October, 2013. The issue for determination are:

- a) Whether the Claimant's employment was transferred from the National Treasury to the Respondent, or he was just seconded there temporarily.
- b) Whether the Claimant was a victim of unfair termination
- c) Whether the Claimant is entitled to reliefs sought in his Memorandum of Claim.

(a) Whether the claimant's employment was transferred from the National Treasury to the Respondent, or just seconded

20. The Claimant argues that he was an employee of the respondent commission herein and not of the National Treasury because after the respondent advertised the position of Assistant Director of Finance and Administration, he successfully applied and he was appointed under a contract of five years, and assigned a Personal Number for the respondent. He further contended that as a result of the foregoing development, he sought early retirement from the National Treasury and henceforth became employee of the Respondent Commission.

21. The Respondent, on the other hand, contended that the Claimant was seconded from the National Treasury during the period she was formulating procedure and structures and that he remained a permanent employee of the National Treasury working on secondment to the Commission. The Respondent further contended that she did not terminate the Claimant's services but rather transferred him back to his parent employer once she had in place structures and policies. She submitted that the Claimant's secondment to her did not mean that he ceased being an employee of the National Treasury as alleged by the Claimant.

22. Secondment has been defined as follows according to the Oxford Dictionary of English, 2017 edition as follows:

“Secondment is the temporary transfer of an official or worker to another position or employment.”

23. The Black’s law Dictionary, Tenth Edition defines secondment as:

“A period of time that a worker spends away from his or her usual job usually either doing another job or studying.”

24. According to the letter dated 30th September, 2015 from the Principal Secretary, National Treasury, Dr. Kamau Thugge, the Claimant was posted from the National Treasury to the respondent for an indefinite period. The letter stated that:

“POSTING OF FINANCE OFFICERS

The following posting of Finance Officers have been agreed upon:

1...

4.Mr. John Misiga, currently Chief Finance Officer, Budget Supply Department to be posted to the National Land Commission in the same capacity.

5...”

25. Further to the foregoing, the letter dated 15th October, 2013 to the Claimant clearly indicates that the Claimant was transferred from the National Treasury to the respondent herein as opposed to being seconded. The said letter fully released the claimant to go to a new work station indefinitely and bid him farewell as follows:

“Dear Sir,

RE: TRANSFER

Our letter Ref. No. 1987001257 (10) dated 11th October refers.

You are hereby released to report to the National Land Commission with immediate effect but not later than 21st October, 2013.

By a copy of this letter the Chairman, The National Land Commission is requested to inform this office the date you report for your duty.

I take this opportunity to thank you very much for the services you rendered the National Treasury and best wishes in your new work station.

Yours Faithfully,

Signed

Mary M. Ngugi (Mrs)

For: PRINCIPAL SECRETARY

26. In the case of *Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another [2013]eKLR*, cited in the article *Employment Law: Transfer and Secondment of an employee, Shearn Delamore & Co., vol 7 No. 2.0, June 2008*, I notes that:

“In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead the company which, the employee has been transferred to it now regarded as his employer. The opposite is however, the case where an employee has been seconded. In such a situation, the company which secondes the employee remains the employer at all material times and not the company to which the employee is seconded. ... The ordinary meaning of secondment as a temporary transfer is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other. ... Therefore, so long as the contract is not terminated, a new contract is not made, and the employee continues to be in the employment of the original employer.”

27. I entirely agree with the foregoing view and based on the facts of this case proceed to make a finding that the claimant was not seconded to the respondent but rather transferred to the respondent by the letter dated 15.10.2013 for an indefinite period. If at all he was required to report back to the National Treasury, the same would have been indicated in the letters between the claimant and the respondent. This view is corroborated by the fact that after the transfer, the respondent issued the Claimant with a letter of Appointment dated 28th October, 2013 stipulating the terms of engagement between him and the respondent without any mention of the former employer. The engagement was under a renewable fixed term contract of 5 years with no mention of a possibility of returning to the former employer, and the claimant was allocated a new personal number, NLC20140067 by the commission as the other staff of the commission. In addition, it was agreed by the witnesses for the two sides that all the salary paid to the claimant by the former employer during the transition period was refunded to her by the respondent and the claimant removed from the pay roll of the former employer. Finally, the said change of employer was further corroborated by the fact that by the letter dated 25th July, 2014, the claimant requested the National Treasury to retire him under the 50 years Rule and the request was duly accepted by the letter dated 8th September, 2014 signifying the end his employment relationship with the National Treasury.

(b) Whether the Claimant was a victim of unfair termination

28. The Claimant contends that his alleged posting back to the National Treasury by the Respondent commission vide its letter dated 14th August, 2015 amounted to unfair constructive termination as the same was done without consultation. However, the Respondent denied the alleged termination of the claimant's services and insisted that she just posted him back to his parent employer and paid him all his dues under his contract. I however disagree with the Respondent that posting back of the Claimant was not a dismissal. As already observed herein above, the claimant was never seconded to the respondent but rather transferred there for an unspecified period and subject to such terms of engagement to be agreed between the two parties.

29. In my view, the respondent was bound by the contract between her and the claimant to continue employing him until the same lapsed by effluxion of time or until such a time when it would be prematurely terminated by a notice or for a cause. It was therefore a breach of the said contract to terminate it without prior notice and without a valid reason before the lapse of the 5 years' term in the guise of posting the claimant back to the former employer. The said breach amounted to constructive termination of his 5 years' employment contract.

30. The said termination was unfair because the respondent did not prove that she had valid and fair reason for terminating the five years' contract prematurely. She further did not prove that the claimant was accorded a fair hearing before the termination in the guise of posting him back to the former employer. It is now settle by the statute law and judicial opinion that termination of the employee's employment is unfair if the ground upon which it stands is not valid and fair and if a fair procedure was not followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements, while fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination.

31. I have considered the precedents cited by the parties herein. However, the facts of this case are distinguishable from those in the precedents cited by the respondent because in the said precedents, the employees had been seconded to other employers as opposed to transfer.

(c) Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim

32. In view of the foregoing, I make a declaration that the termination of claimant's contract of employment by the respondent was unfair and unlawful as prayed. Accordingly, under section 49(1) of the Employment Act, I award him 12 months' salary compensation for the unfair termination. In granting the said compensation, I have considered the fact that he never contributed to the termination through misconduct, his reasonable expectation to continue working for the remaining three years before the lapse of the five years' contract, and the fact that at the age of 56 years he stood no good chances of securing any alternative job with comparable income.

33. The Claimant admitted in his pleadings and in evidence that he was paid three months' salary in lieu of notice, service gratuity at the rate of 31% of his salary for the period worked, and accrued leave days for the financial year 2014/2015. He is therefore estopped from claiming the same again.

34. In addition, he is not entitled to Claim payment of salary and other benefits for the unfulfilled Contract period since it has no basis in the contract of employment. In **DK NJAGI MARETE vs. TEACHERS SERVICE COMMISSION – INDUSTRIAL CAUSE No 379 of 2009** Rika J had the following to say regarding compensatory damages:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

Conclusion and disposition

35. I have found that the claimant was not seconded to the respondent but rather transferred there with no indication that he would report back to the National Treasury. I have further found that the respondent was bound to continue employing the claimant for the 5 years' contract period unless otherwise terminated prematurely by notice or for cause. Accordingly, I have found that the purported posting of the claimant by the respondent back to the National Treasury before the lapse of the contract period amounted to constructive termination of the contract.

36. Finally, I have found that the Claimant's contract herein was unfairly terminated by the respondent and awarded him compensatory damages. Consequently, I enter judgment for him in sum of Kshs.5,736,840. The award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 1st day of, November 2019

ONESMUS N. MAKAU

JUDGE