



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1314 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 28<sup>th</sup> February 2018)**

**SELEST N. KILINDA.....CLAIMANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY**

**MINISTRY OF ENERGY AND PETROLEUM.....2<sup>ND</sup> REPENDENT**

**JUDGMENT**

1. The Claimant herein filed his Statement of Claim on 16<sup>th</sup> August 2013 through the firm of Mwaniki Gachoka & Company Advocates. It is the Claimant's claim that on 10<sup>th</sup> December 2007 he was employed by the 1<sup>st</sup> Respondent as a Chief Manager Finance and Strategy on a 3 year contract. On 15<sup>th</sup> October 2008, he was confirmed in this position.

2. That on or about 9<sup>th</sup> January 2009, the then Managing Director of 1<sup>st</sup> Respondent, Mr. George Okungu was suspended from office and on 20<sup>th</sup> January 2009 the Claimant was appointed by the Board of Directors of 1<sup>st</sup> Respondent as an Acting Managing Director from 9<sup>th</sup> January 2009. Later on, the post of Managing Director was advertised and Claimant was interviewed for the same culminating in his appointment as Managing Director of 1<sup>st</sup> Respondent on 6<sup>th</sup> August 2009. His 3 year contract as Chief Manager, Finance and Strategy terminated automatically.

3. It is his claim that he served the 1<sup>st</sup> Respondent with diligence, trustworthiness and efficiency and his contract was renewed for a further term of 3 years on 7<sup>th</sup> November 2012 with effect from 6<sup>th</sup> August 2012. The remuneration attached to this contract was basic salary of Kshs.560,000/= per month with house allowance of 80,000 and another allowance of 100,000/= per month.

4. It is his position that he served well uninterrupted until 28<sup>th</sup> May 2013 when he received a letter signed by one Paul G. Ngatia for the Permanent Secretary stating as follows:-

***“The Cabinet Secretary has studied the above report which has been prepared by the Efficiency Monitoring Unit (EMU) and found it necessary to ask you to proceed on your 30 days normal leave starting 29<sup>th</sup> May 2013 to facilitate full investigations. You are therefore asked to hand over to the next senior most officer to facilitate smooth operations of the Company while you will be away on leave”.***

5. The Claimant avers that he proceeded on leave as directed and handed over the functions of his office to Miss Flora Okoth the Company Secretary. While on leave he learnt that, the Board of Directors appointed the Chief Manager Finance and Strategy, Mr. Charles Tanui as the Acting Managing Director.

6. On 29<sup>th</sup> June 2013 while still on leave he received a letter from 2<sup>nd</sup> Respondent indicating him that his services had been terminated with effect from 26<sup>th</sup> June 2013. The letter informed him that he would be paid an equivalent of 3 months basic salary and housing allowance only in lieu of 3 months' notice. He avers that prior to his termination, he never received any warning letter from the 1<sup>st</sup> Respondent.

7. He contends that he was denied fair labour practices and his rights as enshrined in the Constitution of Kenya 2010. He avers that the termination was in total disregard to the law, unprocedural and an outright violation of the provision of the Employment Act 2007. He avers that he was not informed of the reasons of the termination, he was not given a show cause letter nor given an opportunity to be heard at all. He therefore avers that the termination was wrongful, unlawful and unfair. He contends that the termination was against the rules of natural

justice.

- 8.** The Claimant avers that the contract that was unfairly terminated was for 3 years and he lost remuneration equivalent to the remainder of the term being 24 months = 17,760,000/=.
- 9.** He avers that he also lost gratuity of 31% of the basic salary being 31% of 560,000 x 36 = 6,249,600/=. He also states that he lost leave allowance of 50,000/= per annum total for 2 years being 100,000/=.
- 10.** The Claimant prays that the termination be declared wrongful, unlawful, unfair and that he be paid as prayed in the claim.
- 11.** The Respondents opposed this claim. 1<sup>st</sup> Respondent filed their Response on 21<sup>st</sup> September, 2013 through the firm of Prof Albert Mumma & Company Advocates.
- 12.** The 1<sup>st</sup> Respondent raised a Preliminary Objection to the effect that the claim was filed contrary to the express provisions of Section 44 and 45 of the Employment Act.
- 13.** The 1<sup>st</sup> Respondent admits employing the Claimant as Ag Managing Director and later confirming him. They however aver that the Claimant abused his office and engaged in activities, which contravened the express terms of his contract which aspect was revealed in May 2013 following investigations carried out by the Government's Efficiency Monitoring Unit (EMU), an independent organ of the Government charged with Monitoring the Management and Operations of State Corporations.
- 14.** They aver that the report revealed that in the course of employment, the Claimant engaged in acts of nepotism and employed his brother and two sisters as employees of the 1<sup>st</sup> Respondent thus breaching Article 232 of the Constitution and the Public Officers Ethics Act 2003.
- 15.** The 1<sup>st</sup> Respondent avers that the Claimant participated in the investigations and was granted an opportunity to defend himself against the issues, the subject of the investigations and was fully heard on the issues. That the Claimant was then asked to proceed on compulsory leave to allow for further consideration of the findings of the investigation.
- 16.** That on 27<sup>th</sup> June 2013, he was invited to a special Board of Directors meeting at which he was given an opportunity to defend himself and indeed made representations to the Board regarding the finding of Efficiency Monitoring Unit (EMU) against him. He was then issued with a termination notice pursuant to the express provisions of Clauses 2 and 26 of his contract of employment. He was thereafter paid an equivalent of 3 months' salary in lieu of notice pursuant to Clause 26 of the contract of employment.
- 17.** The 1<sup>st</sup> Respondent denies that the Claimant was terminated abruptly but that the same was done following fair and lawful procedure. They also aver that the Claimant was paid all his dues and benefits arising out of the contract. They also aver that the Claimant having acted as he did, he was liable for summary dismissal.
- 18.** The 1<sup>st</sup> Respondent denies that the Claimant suffered any loss nor is he entitled to prayers sought in the claim. The 1<sup>st</sup> Respondent wants this claim dismissed accordingly.
- 19.** The 2<sup>nd</sup> Respondent on their part filed the Memorandum of Reply to Memorandum of Claim dated 28<sup>th</sup> October 2013 through the State Law Office.
- 20.** The 2<sup>nd</sup> Respondents aver that the Cabinet Minister had the right to terminate the contract prematurely upon the advice of the Board on the performance of the Claimant.
- 21.** They refer to Clause 4 of the contract of employment. They reiterate averments made by the 1<sup>st</sup> Respondent on issues of nepotism emanating from the Efficiency Monitoring Unit (EMU) report. That the report of Efficiency Monitoring Unit (EMU) was discussed by the Board of Directors who gave the Claimant an opportunity to be heard. The Board then recommended that the Claimant be terminated which recommendation was acted upon by the 2<sup>nd</sup> Respondent.
- 22.** The 2<sup>nd</sup> Respondent also avers that no notice to sue was served upon the Attorney General under Section 13 of Government Proceedings Act.
- 23.** The Claimant denied all the averments of the Respondents. In particular, the Respondent denies the alleged meeting of the Board of Directors of 1<sup>st</sup> Respondent as there is no invitation to such a meeting. He denies attending the meeting on 17<sup>th</sup> June 2013 or giving any submissions therein as he was never invited to such a meeting. He reiterates his averments in the Memorandum of Claim.
- 24.** The Claimants filed a notice of change of Advocates on 11<sup>th</sup> July 2014 by the firm of Achach & Company Advocates. This claim proceeded for oral hearing and the Claimant gave his evidence reiterating evidence contained in his Pleadings.
- 25.** In cross-examination he stated that one Agnes Walowe Kilinda is his sister and she was employed at Kenya Pipeline Company (KPC) in August 2012 and one Donald Nyambu in his brother was employed in 2009. He also admitted that another sister Marietha was employed in 2009. He denied that Caxton Gambo who is Chief Internal Auditor is his relative. The Claimant denies that he was involved in recruitment of his relatives nor that he influenced their appointment.

26. The Claimant also denied joining the Board meeting of 17th June 2013 as indicated at page 43 of 6 of the minutes. He indicates that on this day, he was still Managing Director and the minutes do not show that he was on the list of attendees. He also stated that he was never invited to the meeting.

27. The Respondents did not call any oral evidence.

28. The Claimant's case was closed on 21<sup>st</sup> July 2015 and the Defence case scheduled for 15<sup>th</sup> December 2015. The Defence was given an opportunity to call their witnesses and on 6 different occasions they sought adjournments until the Court ordered close of their case on 23<sup>rd</sup> May 2017.

29. The parties filed their respective submissions. The Claimant has cited **John Did Omulo vs Small Enterprises-Finance Company Limited & Another (2005) eKLR**; where Warsame Judge, (as he then was) applied the holding in CMC Aviation Limited vs. Cruisair Limited (No.1) where Madan J.A held as follows:-

*“The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them as proof of the foundation of evidence. As stated in the definition of evidence in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved. Averments are matters the truth of which is submitted for investigation! Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of evidence in Cassell's English Dictionary Page 394:*

*“Anything that makes clear or obvious ground for knowledge, indication or testimony that which makes truth evident to the mind that it is truth”.*

30. They also cited **HCCC No. 115/2011 Interactive Gaming & Lotteries Limited versus Flint East Africa Limited and 2 Others** where Odunga Judge in a similar situation opined as follows where witnesses had refused to testify:-

*“It is my view and I so hold that the evidence of Iavor Kurtev and Ivaylo Buzoukov and in particular the latter was crucial to Flint's case yet no explanation was given for their convenient and almost deliberate abstention from participating in these proceedings. In the case of Green Palms Investments Limited vs. Kenya Pipeline Company Limited Mombasa HCCC No.90 of 2003, it was held that the failure by a party to call as a witness to any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. In my view, this is a classic case in which adverse inference out to be invoked”.*

31. The Claimant on relying on the above authorities submitted that the Claimant's evidence stands unchallenged and they submit that pleadings are not evidence.

32. I have examined the evidence, pleadings and submissions filed by the parties. The issues for consideration are as follows:-

**1. Whether the Claimant was fairly and lawfully terminated.**

**2. Whether the Claimant is entitled to prayers sought.**

33. On the 1<sup>st</sup> issue, I note that the Claimant gave evidence explaining the events leading to his termination. The reason given for the termination of the Claimant is contained in his termination letter dated 26<sup>th</sup> June 2013 indicated that this was after reflection made on the Board's resolution.

34. The Board resolution are contained in the Minutes of the Board dated 17<sup>th</sup> June 2013. These minutes were forwarded to the 2<sup>nd</sup> Respondent on 17<sup>th</sup> June 2013 and they recommended the termination of the Claimant for reasons of engaging in nepotism. The issue of nepotism came out of the Claimant's evidence and he admitted that his brother and 2 sisters were employed by the 1<sup>st</sup> Respondent during his tenure as Managing Director but that this was done in the normal course of employment without his influence.

35. The Respondent have indicated through their submissions that the Claimant was given an opportunity to defend himself on these allegations. This, the Claimant has denied stating that he has never attended any Board meeting and there is indeed no invitation letter exhibited before Court showing he was asked to come and attend the meeting given that on this date he was on leave as per the letter dated 28<sup>th</sup> May 2013 which asked him to proceed on a 30 days leave.

36. Section 43 of Employment Act opines that before an employer proceeds to terminate services of an employee they must have valid reasons. The reasons must be real reasons existing at the time which prompts the employer to proceed and terminate the employee. Other than valid reasons the employer must accord the employee an opportunity to defend himself and present evidence on the allegations levelled against him.

37. The form of opportunity for hearing is as envisaged under Section 41 of Employment Act which states as follows:-

**1) “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of**

misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

38. It is envisaged that the employee will understand the grounds upon which the employer considers to warrant his termination. The only way the employee can have for proper articulation of his defence is to be informed of the charge/s against him.

39. The Claimant has denied he was given any opportunity to defend himself and indeed there is no evidence that he was informed of the reasons to which termination was being considered. No invitation to a disciplinary hearing is displayed. There is no evidence that he even attended the meeting. As at 17<sup>th</sup> June 2013, the Claimant was Managing Director of 1<sup>st</sup> Respondent. The Minutes displayed in Court do not show that he was part of the people that attended the meeting. His name is missing in the list of attendees.

40. My inference from the above events is that there may have been reasons to warrant termination of the Claimant. These reasons were never brought to the attention of the Claimant nor was he ever given an opportunity to defend himself nor state his case.

41. Under Section 45 (2) of Employment Act 2007 on other hand states as follows:-

*(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.*

42. In the current case, given that due process was not followed, I find the Claimant's termination unfair and unjustified and I declare it so.

43. The Respondent as stated above did not call any evidence. The Pleadings in the file were never formerly presented to Court. Pleadings are not evidence. This is the holding in case law cited above see **John Didi Omulo vs Small Enterprises-Finance Company Limited & Another (2015) (supra)**, **CMC Aviation Limited vs Cruisair Limited (supra)** and **Interactive Gaming & Lotteries Limited vs Flint East Africa Limited and 2 others (supra)**.

44. Given that the Respondents never called evidence, it means there was no evidence to counter the Claimant's case. That notwithstanding the Pleadings of the Respondents alone as they stand show gaps which show non-adherence to rules of natural justice or fair hearing as found above.

45. On remedies, the Claimant's contract was for 3 years. The claimant served for only 1 year and he had a legitimate expectation to serve his full 3 years. The Claimant was terminated on 26<sup>th</sup> June 2013 with 24 month of the contract unserved. I therefore find that he is entitled to his expected remuneration for the remainder of this contract period amounting to  $740,000 \times 24 = 17,760,000/=$ .

46. I am guided by the finding of **Pravin Bowry vs Ethics and Anti-Corruption Commission (2013) eKLR** where the High Court Judge opined as follows:-

*“However, the principle of legitimate expectation coupled with the finding by the Court on the issue of discrimination entitles the Claimant to the net amount due at the rate of Kshs.750,000/= for the period of forty six months from 1<sup>st</sup> September, 2011 to 30<sup>th</sup> June, 2015 as set out under prayer 30(b) in the statement of claim being net salary and allowances agreed upon on a monthly basis in the sum of Kshs.34,684,000/=.”*

47. This was the basis upon which the Plaintiff in **Southern Highlands Tobacco Union Limited vs David Mcqueen (1960) I EA 490** was awarded salary for the remainder of 4 years' service on the premise that:-

*“thus a person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of the dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation.”*

48. Under the contract of employment, the Claimant was also entitled to gratuity being 31% of his basic salary. I therefore award the Claimant this amount which translates to  $31/100 \times 560,000 \times 36 = 6,249,600/=$ .

49. The Claimant is also awarded 6 months salary as compensation for unlawful termination which =  $6 \times 740,000 = 4,440,000/=$

**Total awarded = 24,449,600/=**

50. I also award the Claimant costs plus interest with effect from the date of this judgment.

**Dated and delivered in open Court this 28<sup>th</sup> day of February, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Njaanga for Claimant – Present

Ochieng holding brief for Agwara for 1<sup>st</sup> Respondent – Present

2<sup>nd</sup> Respondent – Absent