



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 92 OF 2016

(Before D. K. N. Marete)

ELPA JOHN ESEKON.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF TURKANA...1ST RESPONDENT

EKUTAN WONYANG PAUL.....2ND RESPONDENT

JUDGEMENT

This matter came to court vide a Memorandum of Claim dated 17th May, 2016. It does not disclose an issue in dispute on its face.

The 1st respondent in a Respondents Memorandum of Reply dated 6th July, 2016 denies the claim and prays that this be dismissed with costs.

The claimant's case is that he was employed as a Managing Director and Chief Executive Officer of LOWASCO having been appointed by her Board of Directors vide a 1st contract signed by the chairman on 8th April, 2014 to 4th April, 2016. He had served one year in acting capacity.

The claimant's further case is that whereas his contract was expected to expire on 4th April, 2016, the LOWASCO Board convened an Extraordinary General Meeting (EGM) on 29th December, 2015 to consider his future contractual terms. He had expressed interest in 1st and 2nd term three year contract and this was approved by members present due to his good performance.

The claimant's other case is that a board meeting was convened on 29th December, 2015 mandating the claimant to call a special board to approve his contract but this was disrupted but the chairman took leadership and signed the contract subject to negotiation between the claimant and the incoming board.

The claimant further avers that on 31st March, 2016, the 2nd respondent - Chief Officer, department of water, Irrigation and Agricultural for the 1st respondent called a meeting of LOWASCO employees on 1st April, 2016 in which he announced that the claimant was no longer the Managing Director and subsequently instructed the secretary to lock the office and give him the keys. This matter was reported to the police and county secretary but no action has been undertaken. This has caused confusing and untold suffering for the claimant. This is further expressed as follows;

13. The Claimant further states that the conduct of the 2nd Respondent who is the employee of the 1st Respondent has since brought a lot of harm to the claimant and the smooth operations of LOWASCO on the following grounds;

a) Closing of the Claimant's office without consulting the management of LOWASCO and without authority or reference. Whereby LOWASCO is an independent corporate entity discharging its mandate and functions which have now been left without formal directions and control.

b) The 2nd Respondent called a LOWASCO employees meeting and addressed them without consulting the management of LOWASCO. He went on to address LOWASCO matters for which he has no formal appointment to transact. The 2nd Respondent has gone on to change LOWASCO account bank signatories without authority.

c) The 2nd Respondent went on to comment on the Claimant's contract of which he is neither a party to it, nor a signatory. He went

to on to unilaterally declare that the contract was not valid without consulting the parties to the contract or seeking the determination of the same by a competent authority. He thus renders LOWASCO to operate without a formally appointed Managing Director.

d) The 2nd Respondent has gone to perform LOWASCO management duties through the Principal Administration Officer for water who is an employee of the 1st Respondent without formal authority and reference hence the 2nd Respondent has acted contrary to the clause in contract between the Claimant and the LOWASCO Board whereby termination of the contract is through a written form with justifiable reasons.

e) The 2nd Respondent purportedly claims to have taken over the control and protection of assets leased to LOWASCO through a Service Provision Agreement (SPA) with Rift Valley Water Service Board (RVWSB). The SPA clearly defined procedures through which the assets can be repossessed. The 2nd Respondent is not party to the Service Provision Agreement.

f) The 2nd Respondent has unlawfully claimed that the 1st Respondent is in the process of recruiting LOWASCO directors as if the same are County Directors. LOWASCO directors are company directors that are constituted through the procedure laid down by Water Services Regulatory Board (WASREB) and a clear WAREB advisory. The 1st Respondent is only required to nominate 2 directors to the LOWASCO board.

The claimant further supports his case on the following averments;

15. The Claimant further avers that the 2nd Respondent who is the employer of the 1st Respondent has acted illegally and/or unlawfully and/or irregularly in this comments on the contract between the claimant and LOWASCO. The 2nd Respondent states that the MD contract expired on 31st March, 2016 yet contract was to run to 4th April 2016

i) That LOWASCO is corporate entity created by the Water Act No. 8 of 2002 as a company under the Companies Act Cap Laws of Kenya. It has a separate role and functions of water provisions in the water Ministry/department in policy, coordinating, infrastructure/assets and funding of water projects. The two roles are separate and clearly defined the Chief Officer has no basis to transact LOWASCO matters.

ii) Failing to give the Claimant any notice of any adverse allegations against him to enable him defend himself.

iii) The Respondents have no power to recruit, employ and/or terminate the services of employees of Lodwar Water and Sanitation Company. That function is vested to the LOWASCO Board of Directors. LOWASCO is an incorporated company whose management and control is done by the Board of Directors and any other persons duly nominated by the LOWASCO Board.

iv) The action by the 2nd Respondent who is an employee of the 1st Respondent is baseless as they are decision made attend. The 2nd Respondent has not produced any authority or basis for his action but went on to act unilaterally and without reference.

The misconduct on the part of the 2nd respondent has aggravated loss of income with non remittance of the salary for April, 2016.

He prays as follows;

i) The interference/intrusion of the 2nd Respondent into the management of LOWASCO by making uninformed comments on the MD Contract for which he is not a signatory nor a party to which is contrary to the provisions of the law of contract, employment law and any other law and that the contract is still valid and enforceable for all intent and purpose thereto and that the claimant should continue holding office until the expiry of the term or until the relevant body/authority state contrary but in accordance with the law.

ii) A declaration that the conduct of the 2nd Respondent who is the employee of the 1st Respondent was and still remains illegal and/or irregular for all intent and purposes thereto and that the 2nd Respondent should be compelled by this court to reopen forthwith the office of the Claimant herein and to further cease from interfering with other LOWASCO management operation and duties of the Claimant.

iii) The Respondents and their agents and/or employees and/or workers be stopped from commenting negatively on the operation of LOWASCO without formal due procedure laid down until the law.

iv) Cost of the suit and damages.

v) Any other relief this Honourable Court may deem fit to grant.

The 1st respondent's case is a denial of the particulars of claim. She denies that the claimant was ever the Managing Director or Chief Executive Officer of LOWASCO. This is as follows;

4. The respondents deny the averments in paragraphs 5 and add that the claimant had never been the Managing Director or the Chief Executive Officer of LOWASCO. On the contrary, he was appointed as the acting Managing Director through a letter of appointment dated 28th December 2013. This position was subject to confirmation at the next full Board of Directors meeting. There has never been a full Board of Directors meeting since. This position was made unequivocally clear to the claimant. To this

extent, the claimant shall be put to strict proof as to otherwise of his averments. (Refer to a letter dated 8th April 2016 from the Chief Officer Water Agriculture and Irrigation and addressed to the claimant)

5. The respondents deny the averments contained in paragraph 6 and reiterate that, at no particular time was the claimant appointed as the Managing Director or the Chief Executive Officer of LOWASCO. That again, the further appointment claimed of in an Extraordinary General Meeting on 29th December 2015 is a nullity for the following reasons:

a) First, LOWASCO is a company incorporated under the Companies Act Cap 486. Accordingly, its running, management and operations must be done in accordance with its Memorandum and Articles of Association. (Refer to a copy of Memorandum and Articles of Association of LOWASCO attached herewith)

i) Clause 45(a) of the Articles of Association, demands that every meeting, should have 21 days' notice, or be ratified by members holding at least 95% of the nominal value of shares. The 1st Respondent was not represented in all the meetings that were purportedly held yet it is the majority shareholder, holding 60% of the shares.

ii) Again, under clause 44 of the Articles of Association of LOWASCO, an Extraordinary General Meeting can only be called by the directors or through requisition by duly signed members and which requisition must state the objectives of such a meeting.

b) At the time of the purported Extraordinary Meeting, there was no validly constituted Board of Directors as the term of the directors had expired in 2013. As such no entity could purport to exercise directorial functions. (Refer to a letter dated 11th June 2014 from the Rift Valley Water Services Board and letter dated 13th April 2016 from the Acting CEC for water, Irrigation and Agriculture)

c) Secondly, the person who purportedly executed the letter of appointment was neither the chairperson of the Board nor authorized to bind the Board in any way. Facts which were brought to the attention of the claimant.

d) Again, the purported Extraordinary meetings which led to the appointment of the claimant were illegal, null and void and nothing lawful could come out of them;

i. The Extraordinary meeting held on 26th April 2014 at St. Theresa's Conference Hall was neither convened by directors, now was it requisitioned by any member. There were no directors who were legally in office. Accordingly, the meeting was attended by impostors who were neither directors nor members of the company.

ii. The Extraordinary Meeting held on 29th December 2015 (or 1st December 2015) at Bethany Dol Hall in Lodwar was a nullity. First, no notice was issued as required under LOWASCO's Memorandum and Articles of Association as well as the law. Secondly, the meeting was equally attended by impostors, the employees of the company were co-opted in the meeting as members and under suspicious circumstances dismissed from the meeting. Again, no minutes were taken or signed.

iii. With regard to the notice of the Special LOWASCO Board of Directors Meeting for 11th March 2016 at Kefri Resource Centre, Moi Gardens Lodwar, such was illegal as there is no legally constituted board of LOWASCO.

iv. Again, the claimant has admitted that the said meeting which purportedly appointed him was concluded as it was disrupted. That one professor Thomas Akuja took it upon himself and purportedly signed the contract of renewal. His acts were a nullity as he was neither a director nor the Chairperson of the LOWASCO Board of Directors. His term in office having come to an end. The claimant was notified of these illegalities but continued clinging in office unlawfully.

e) It is the foregoing series of illegalities that led to the purported appointment of the claimant as the Managing Director of LOWASCO. All such acts were a nullity with the definite consequence that the claimant's contract ended on 31st March 2016.

14. Further, the claimant's averment that he was entitled to be given a notice is suspect:

a) The claimant was not terminated from employment as there was no contract of employment to begin with;

b) At all material time he received communications informing him about the status of his contract of employment which had expired;

c) The claimant in his witness statement admits that on 31st March 2016, he was informed by the 2nd respondent that his contract had expired and that he needed not report to work. He also admitted that he was informed that the management and employees were unwilling to work with him. His averments that he was not given notice of advance allegations are therefore moot.

15. That again, the claimant has been unable to develop a good working relationship so much so that the management as well as other staff of LOWASCO have openly refused to work with him. Most importantly, they have found him to have misappropriated company funds as such, his insistence is only meant to paralyse the smooth operations of LOWASCO for selfish reasons much to the detriment of the residents of Lodwar and its environs. (Refer to petitions of complaints signed by employees of LOWASCO dated 14th April 2014, another petition dated 31st March 2015 and minutes from the Management of LOWASCO dated 31st March 2016)

The matter came to court variously until the 13th of June, 2018 when they agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was any termination of the employment of the claimant by the respondent?
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was any termination of the employment of the claimant by the respondent. It is the claimants case and submission that the respondents constructively terminated his employment as Managing Director – LOWASCO by the 2nd respondents issuing instructions that he be locked out of office and that the office keys be handed to him for custody. The respondents deny this and submit a case of the claimant never having been appointed Managing Director – LOWASCO but instead having merely acted as such and he was always informed of this eventuality.

The 1st respondent *in toto* deny the claimants appointment as Managing Director – LOWASCO. It is her case and submission that the alleged appointment as such managing director was illegitimate as there was no board of directors to effect such appointment in the first place. This is because the board had **long expired** and the acting board with Professor Akuja as chair was a mere pretender and incapable of the legitimacy to effect any appointments as a board of directors of LOWASCO.

The 1st respondent in her written submissions dated 30th May, 2018 further sought to rubbish the claimant's allegations on appointment as Managing Director – LOWASCO by relying on the authority of **George S Onyango v Board of Directors of Numerical Machining Complex Limited Minister for Industrialization Attorney – General, [2012] eKLR** where the court observed as follows;

... the court in upholding the petition went on to hold that The court finds that the appointment of Professor Nick Wanjohi as the Chairman of Numerical Machining Complex set in motion the process by which an illegitimate Board of Directors was ushered in at the helm of the company. This was in violation of Section 5[1] of the State Corporations act which mandates the appointing authority to follow the Articles of Association of the Company. The Minister followed suit, and appointed Board Members. What became of the old Chairman, and his Board” The establishment of the new Board was carried out in a manner to suggest theirs were the pioneer Board at the Company. The Respondents submitted there was no properly appointed Board prior to the 18th November 2011. The truth is that even after 18th November 2011, there was no validly created Board. It was not made clear why the previous Board was not, in the eyes of the Respondents, properly in office. There was nothing reversing the instruments by which the first Board was established. The Court is convinced the Board Chaired by professor Nick Wanjohi, which is the subject matter of the Petition, has no legal validity. The Court agrees with the holding in Julius Nyarotho v. the Attorney-General & 3 Others [2013]e-KLR; - any decisions made by the illegally constituted Board Were illusory and have no effect in law. Decisions made relating to labour and employment at the workplace; the recruitment, supervision, promotion, demotion, and administration of contracts of employment carried out in the name of the Board constituted after 18th November 2011, are not worth the paper they are written on.

Further,

... the new Chairman was appointed on 18th November 2011, and new Board Members on 20th January 2012. The request for renewal was directed to this Board. He wrote a second letter of request dated 9th July 2012, which would be seen as a reminder to the first request. The Board replied on 3rd September 2012 advising the Petitioner, his contract would not be renewed, and placing the Petitioner on terminal leave, decisions which sparked this dispute. Plainly, the Board lacked the legitimacy to make these decisions. Professor Nick Wanjohi was not legally in the position of the Chairman, and the other Board Members were not shown to have been appointed in accordance with the Articles of Association. Their decisions were illusory.

The 1st respondent further buttresses her case by relying on the authority of **Kyangavo v Kenya Commercial Bank Ltd & another [2004] eKLR** Njagi, J. held that;

Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in the Court, quite frankly, that since leaving employment of the bank over four years ago, h has never paid a cent towards redemption of loan. He admits that he is in default, and yet he is also in possession. He cant have it both ways. Either he pays the loan, or allows the bank to realize its security.

It is the respondents case that all this time, the claimant has come to court without clean hands and is not deserving of equitable considerations. This is more so bearing in mind that the performance of the claimant in his tenure as acting Managing Director was tumultuous and riddled with gross misconduct leading to his loosing touch with other workers of LOWASCO.

A scrutiny of the respective cases of the parties leaves the claimants case of termination of employment naked. It lacks basis whatsoever. The respondents overwhelmingly bring out and support a case of no appointment of the claimant to the position of Managing Director – LOWASCO as he alleges. It is their solid case that the claimant only served as an acting Managing Director and no more. In the least, the purported appointment by an acting Board of Directors was illegitimate and utterly unlawful as no Board of Directors for LOWASCO existed at the time. The last one had been in 2013. Any purported appointment as Managing Director – LOWASCO can only be a figment of the rich imagination of the claimant and that only. I therefore find a case of no termination of the employment of the claimant by the respondent and hold as such.

With a finding of no termination of employment of the claimant by the respondent, the other issues for determination fall by the way side. They become non issues and not worth of any consideration.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 26th day of June, 2018.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Koko instructed by Obondo Koko & Company Advocates for the claimant.
2. Mr. Munywa instructed by Rachier & Amollo Advocates for the 1st respondent.
3. No appearance for the 2nd respondent.