



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 2211 OF 2012

JAMES MUCHENE NGEL.....CLAIMANT

VERSUS

STEPHEN VILJOEN.....1ST RESPONDENT

IVOR MATHEE.....2ND RESPONDENT

BOC KENYA LIMITED.....3RD RESPONDENT

JUDGEMENT

1. This is a fairly old matter having been initially filed at the High Court in 2001 and later transferred to this court when it became exclusively seized of employment and labour relation matters. The pleadings herein have been severally amended and re-amended. The last amendment to the plaint at I can glean from the record was done on 5th June, 2006. The court will use this as the plaint in this matter and the defendant's amended defense and counterclaim dated 12th September, 2001 shall be the defense and counterclaim for purposes of this matter.

2. The court must however observe that the pleadings herein were unnecessarily lengthy making it difficult for the court to effectively summarize the facts in dispute. This was a clear case of bad drafting by counsel for the parties. Pleadings ought to be concise and to the point leaving factual details for trial. In summary the claimant pleaded that by a letter dated 28th October, 1996 the 3rd respondent appointed him as Financial Controller. His appointment was subject to probation and confirmation thereafter.

3. According to the claimant he served the 3rd respondent with diligence and distinction such that by February, 1999 he had been identified as the most suitable and qualified Kenyan to hold the post of the Managing Director of the 3rd respondent upon retirement of the incumbent. The claimant averred that in contravention of the Kenyanization policy of the Government, the 1st and 2nd respondent contrived a scheme to defeat the policy on purely racial grounds by purporting to second the 1st respondent as the Managing Director for a period of two years. This attempt was rejected by the immigration department who refused to issue the 1st respondent with a work permit and insisted the incumbent who was a Kenyan remain so upon retirement.

4. According to the claimant, he was identified to be the possible Kenyan Managing Director of the 3rd respondent and representations were made to the Government that he would be trained to succeed the incumbent. This according to him made the government to allow the 1st respondent work permit to act as the 3rd respondent's Managing Director for a period of two years. The claimant further pleaded that contrary to the representations that he would be made the Managing Director, the 3rd respondent's Chairman Mr. J. G. Kibe wrote a letter to immigration accusing the claimant of having committed unspecified offences leading to his summary dismissal. This according to the claimant was intended to pave way for the 1st respondent to become the 3rd respondent's Managing Director.

5. The department of immigration refused this scheme whereupon the claimant averred he heard that other suitable Kenyans were interviewed for the post of the 3rd respondent's Managing Director. The 3rd respondent offered to second him to South Africa for further training but failed to make a commitment that he would be the Managing Director upon his return or even retain his post of financial controller.

6. According to the claimant, he refused the flawed secondment but the 3rd respondent continued to train him locally as Managing Director designate however the 1st defendant embarked on a scheme to maliciously frustrate him leading to his purported summary dismissal on 9th February, 2001. The claimant further averred that in the course of his employment as a financial controller he came across various instances of financial impropriety on the part of 1st respondent whilst serving as business operations director and Managing Director which he questioned and refused to sanction.

7. The claimant further averred that he discovered that he 1st respondent as Managing Director had decided to destroy a competitor Global Cases in circumstances that bordered on criminality and became subject of police investigations leading to prosecution of the 1st claimant and other employees of the 3rd respondent. In order to punish him for cooperating with investigations and to destroy his credibility the claimant averred that the 1st defendant started to bulldoze a flawed disciplinary proceeding against him which was carried out on a date not communicated to him.

8. According to the claimant his terms and conditions of service were governed by his letter of appointment dated 28th October, 1996 and the 3rd respondent's disciplinary code of 1999 which stipulated among others that his services could not be terminated by the 3rd defendant until a disciplinary enquiry was held in which he attended and participated in the appointment of the chairman and that any disciplinary action would meet the requirement of procedural and substantive fairness. There claimant therefore averred that the termination of the services was null and void and sought compensation from the court.

9. The respondent in its response admitted that the claimant was at one time identified as a possible future candidate along with others for the post of Managing Director of the 3rd respondent but he was not ultimately considered suitable for such future post and his candidature was eliminated. The respondent further pleaded that the 3rd defendant in its discretion was not obliged to appoint anyone to any post within the organization. The 3rd defendant further counterclaimed against the claimant for Kshs 2,049,960 being balance due to the 3rd defendant on account of a loan to buy a house.

10. In his oral evidence to court the claimant stated that he worked for the respondent on two intervals, first between 1987 and 1992 and from 1996 to 2001. On second appointment, respondent called him while in England to come and join. When he left in 1992 he was summarily dismissed. He stated that before rejoining he insisted that the respondent puts in place safeguards for human resource. For instance, he was not to be dismissed without due process. According to him, the new Managing Director threatened him with dismissal because he successfully defended a colleague in a disciplinary case. He further stated that earlier he had been accused of sending a rude email to the Managing Director.

11. On 5th February, 2001 he was given a letter to appeal before the disciplinary inquiry and was also given a suspension notice. It was his evidence that before the invitation he was never shown the rude email and not given any complaint. On receipt of the suspension letter he left the respondent. It was his evidence that he wrote to the chair of the Board about the suspension but never got a response. He later got a dismissal letter. In his view the dismissal was contrary to the respondent's HR policy and manual. Regarding the counterclaim he stated that he had paid all his liabilities to the respondent before leaving.

12. In cross-examination, he stated that the respondent ought to have gone through the disciplinary procedure before terminating him and that he was entitled to 3 months' notice of termination or payment in lieu. He recalled he was invited to a disciplinary hearing on 5th February, 2001 but declined to attend for reasons stated in his letter. According to him, he was unprepared for the inquiry and asked for more time.

13. The respondent's witness Mr John Kariuki informed the Court that he was the respondent's Managing Director in 2003 and that the claimant left employment on 9th February, 2001. His position was Financial Controller when he left. He further stated that the claimant's employment letter had a termination clause and this was factored in computing his terminal dues. According to him, the claimant was dismissed for insubordination. He was served with notice to attend disciplinary inquiry but he sent a letter dated 7th February, 2001. A decision was therefore made to summarily dismiss the claimant. He further stated that the claimant's dues were computed but he never collected them.

14. In cross-examination, he stated that the claimant sent a demeaning email to the Managing Director and copied the same to everyone. The respondent's 2nd witness Ms Sarah Onyony informed the court that she joined the respondent in 2008 after the claimant had left. She stated however that she had reviewed the documents concerning the matter and was familiar with it.

15. This suit was filed when the applicable Employment Act was the repealed Cap 226. Under that Act, there was no provision for compensation for unfair termination of service as is in the current Act. An employee then could be dismissed or terminated without assigning any reason. Further, unless it was agreed to the contrary, the quantum of damages payable then was equivalent to the sum of money which could have been paid in lieu of notice of termination. The claimant made reference to the respondent's HR manual and policy but did not point out any provision therein which entitled him to seek the heads compensation he is seeking in his plaint. Further, even if the court were to have the power to order that the termination of the claimant was unfair, the claimant himself admitted that he was invited to attend the disciplinary inquiry but declined to do so citing lack of unpreparedness.

16. In the circumstances and considering that the cause of action accrued under the former Employment Act, the court lacks jurisdiction to question the validity of reasons for terminating the claimant's services and hereby order that he be paid three months' salary in lieu of notice of termination of service as per his contract service. The respondent's counterclaim is hereby disallowed as no evidence was tendered to prove the same.

17. Each party shall bear its own costs.

18. It is so ordered.

Dated at Nairobi this 13th day of July, 2018

ABUODHA J. N.

Judge

Delivered this 13th day of July, 2018

ABUODHA J. N.

JUDGE

In the presence of :

.....Claimant

.....Respondent