



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1623 OF 2013**

**RONALD SIGEY.....CLAIMANT**

**- VERSUS -**

**CHEMOSIT WATER AND**

**SANITATION COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**LAKE VICTORIA SOUTH**

**WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6<sup>th</sup> July, 2018)

**JUDGMENT**

The 1<sup>st</sup> respondent is a water services provider within the meaning of the Water Act, 2002 and operates in conjunction with and at the sole direction and discretion of the 2<sup>nd</sup> respondent. The evidence is that by the letter of appointment signed on 11.09.2009 the 1<sup>st</sup> respondent employed the claimant in the capacity of the 1<sup>st</sup> respondent's Managing Director. The letter stated that the claimant would report to the 1<sup>st</sup> respondent's managing director. The appointment was effective 01.10.2009 upon a renewable one year contract. The contract was renewed by the letter dated 14.10.2010. The renewal was stated to be **"...for a three – year renewable annual performance based contract with effect from 1<sup>st</sup> October 2010."**

By the letter dated 22.11.2010 the 2<sup>nd</sup> respondent conveyed to the claimant that the claimant had failed to proceed on compulsory leave and to hand over to one Mr. James Keitany who had been appointed as the 1<sup>st</sup> respondent's acting Managing Director as per the 2<sup>nd</sup> respondent's letter of 03.11.2010. The letter of 22.11.2010 directed the claimant to hand over to the said Mr. James Keitany and the letter stated that by copy of the letter the said Mr. James Keitany was being advised to take over as the 1<sup>st</sup> respondent's Managing Director. The letter further cautioned thus, **"You are further reminded that you will be fully held responsible for any governance failures that have been cited or may be cited in future in relations to your tenure in office as the accounting officer of the Company."**

The relationship between the respondents was governed by the Service Provision Agreement (SPA) between the respondents and dated 19.03.2007. Clause 19.1 of the SPA provided that if by breach of the SPA the service provider (the 1<sup>st</sup> respondent) seriously threatens public health or safety, or the safety of the facilities, the licensee (the 2<sup>nd</sup> respondent) may issue an emergency notice to the service provider and a copy given to the Regulatory Board without delay. Further, such notice shall specify the breach and the health or safety issues which led to issuance of the notice and further, **"While an emergency notice is in place, the Service Provider shall comply fully with the directions of the Licensee, and shall ensure that its staff and sub-contractors also comply with the Licensee's direction."** Clause 19.3 stated, **"The cost of providing the services and complying with any Licensee directions during the period that the emergency notice is in effect will be borne from the Guarantee provided by the Service Provider to the Licensee."** Finally clause 19.4 thereof provided, **"The Licensee shall have the right to terminate this SPA in an emergency within fourteen (14) days with the written approval of the Regulatory Board if the Service Provider does not comply with Emergency Notice and if no immediate improvement can be foreseen."**

The claimant wrote to the Permanent Secretary, Ministry of Water and Irrigation the letter dated 08.08.2011. The claimant stated that by the letter dated 03.11.2011, the 2<sup>nd</sup> respondent had invoked clause 19 of the SPA and directed that the claimant as 1<sup>st</sup> respondent's Managing Director proceeds on compulsory leave. He stated that he had not been paid a salary from 25.11.2010 amounting to Kshs.1, 260, 000.00 and that the compulsory leave had been illegal. He requested the Permanent Secretary to intervene in the matter. In the demand letter dated 19.01.2012 addressed to the 1<sup>st</sup> respondent's chairman by the claimant's advocates, the letter stated in part thus, **"That on 03.11.2010 acting on directions from Lake Victoria South Water Services Board you directed our client to proceed on compulsory leave. You thereafter broke in to his office and carried out files and other working records, rendering his service delivery difficult."** Further it was stated that the claimant treated the 3 year contract as frustrated and he demanded pay of full salary for the 3 years less one month which had been paid, 3 months notice in lieu of leave and the 25 % of the total earnings he was to earn over the 3 year period.

Against that background the claimant filed the memorandum of claim on 08.10.2018 through Nzamba Kitonga & Company Advocates. The claimant prayed for judgment against the respondents jointly and severally for:

- a) General damages.
- b) A declaration that the termination of his services was irregular, illegal and unlawful and an order that the claimant be paid his dues in the sum of Kshs. 4, 550, 000.00.
- c) An order that the claimant be paid gratuity being Kshs. 1, 170, 000.00.
- d) Costs of the claim and interest thereon and on (a) and (b) above at court rates from November 2010 until full and final satisfaction of the decree.
- e) Any other relief that the Honourable Court may deem fit and just to grant.

The 1<sup>st</sup> respondent filed the response to the claim on 20.05.2016 through Mulondo, Oundo, Muriuki & Company Advocates. The 1<sup>st</sup> respondent's case was as follows:

- a) The claimant was employed by the respondents jointly on 01.10.2010.
- b) On 03.11.2012 the claimant was sent on indefinite compulsory leave by the 2<sup>nd</sup> respondent and that action was without lawful justification. The 1<sup>st</sup> respondent had nothing to do with that action by 2<sup>nd</sup> respondent.
- c) The 2<sup>nd</sup> respondent had interfered with the running of the affairs of the 1<sup>st</sup> respondent by terminating the claimant's employment and freezing the 1<sup>st</sup> respondent's bank accounts.
- d) The claimant was injured as claimed and prayed for but the 2<sup>nd</sup> respondent is solely liable because the 2<sup>nd</sup> respondent perpetrated the injuries against the claimant.
- e) The 1<sup>st</sup> respondent was not liable because it never terminated the claimant's employment. Thus the claimant's suit against it was to be dismissed with costs.

The 2<sup>nd</sup> respondent filed the response to the claim on 24.10.2017 through Staussi & Asunah Advocates. The 2<sup>nd</sup> respondent pleaded as follows:

- a) The 2<sup>nd</sup> respondent was employed by 1<sup>st</sup> respondent and was not an employee of the 2<sup>nd</sup> respondent.
- b) The 2<sup>nd</sup> respondent had no powers over the employees of the 1<sup>st</sup> respondent.
- c) The 2<sup>nd</sup> respondent did not approve that its CEO writes a letter to the claimant sending the claimant on compulsory leave and any such letter was without the 2<sup>nd</sup> respondent's authority.
- d) The 1<sup>st</sup> respondent is solely liable to pay any claimant's dues under their contract of service.
- e) The claimant had an opportunity to mitigate his circumstances in view of the compulsory leave and is not entitled to pay during the leave as prayed for.
- f) The 2<sup>nd</sup> respondent not being the claimant's employer, she is non-suited.

The court has considered the pleadings, evidence, and submissions filed for the parties and the following findings are made on the matters in dispute.

**First**, by the initial letter of appointment signed on 11.09.2009 and the letter of renewal of the appointment for three years dated 14.10.2010, it is clear that the contract of employment was between the claimant and the 1<sup>st</sup> respondent. The two letters as well as the SPA did not by any provision suggest that the 2<sup>nd</sup> respondent was the claimant's employer. Thus the Court returns that the 1<sup>st</sup> respondent was the sole employer of the claimant.

**Second**, the Court returns that the claimant's employment came to an end on 03.11.2010 by the respondent's letter dated 03.11.2010 when the 2<sup>nd</sup> respondent invoked clause 19 of the SPA. The letter stated that it was clear that the claimant was not willing to adhere to the minimum service provision levels as stipulated in the SPA despite the 2<sup>nd</sup> respondent's advice on how to conduct basic water treatment for facilities that are not fully developed. Thus, the letter stated that the 2<sup>nd</sup> respondent could not sit back as the 1<sup>st</sup> respondent supplied the public with raw and unsafe water despite having been directed on how to apply water chemicals to make water portable. Thus, the letter continued, the 2<sup>nd</sup> respondent at the special meeting of 22.10.2010 had resolved as follows:

i) That the 2<sup>nd</sup> respondent commences termination of the SPA by issuing emergency notice per clause 19.1 of SPA.

ii) That structural change is put in place to correct the situation.

The letter then concluded thus, **“In this regard the Board has decided to appoint Mr. James Keitany to act as the Managing Director for Chemosit Water and Sanitation Company with effect from 4<sup>th</sup> November 2010 and you are directed to proceed on compulsory leave immediately.”** The letter concluded that the claimant had to comply per the provisions of the SPA.

The Court returns that in terms of clause 19 of the SPA the decision that the claimant proceeds on compulsory leave was the 2<sup>nd</sup> respondent’s decision by way of the agreed emergency notice that the claimant being the impediment causing supply of raw and unsafe water to the public, in the words of the letter which was addressed to the claimant personally thus, **“It is clear that you are not willing to adhere to the Minimum Service provision levels stipulated in the Service Provision Agreement despite Board’s advice on how to conduct basic water treatment for the facilities that are not fully developed.”** Thus the substance of the emergency notice, as the Court sees it, was that the claimant was the problem as the 1<sup>st</sup> respondent’s Managing Director and the emergency notice had to target his removal within the provisions of the SPA. It is clear that the 2<sup>nd</sup> respondent knew it lacked human resource powers over the claimant and in view of clause 19 the emergency notice anticipated full compliance by the 1<sup>st</sup> respondent by itself and by its entire staff. Sadly, and in the findings of the Court, the 1<sup>st</sup> respondent appeared not to comply with clause 19 of SPA towards lawful termination of the claimant’s employment so as not to be in breach as per provisions of clause 19 – that an emergency agreement must be complied with.

**Third**, by reason of the emergency notice under clause 19 of SPA under the letter dated 03.11.2010, the Court returns that in absence of any overt action by the 1<sup>st</sup> respondent as the employer of the claimant flowing from the emergency notice, the claimant was thereby constructively dismissed from employment of the 1<sup>st</sup> respondent by reason of the 1<sup>st</sup> respondent’s inaction. By reason of that finding, the Court returns that the claimant’s prayer for payment for 35 months of the unexpired period of service of the 3 years’ contract as was renewed will fail. The Court finds that the claimant’s continued employment was founded upon the continued successful performance of the SPA between the respondents. The 2<sup>nd</sup> respondent resolved to initiate an end to the SPA in terms of the emergency notice conveyed by the letter of 03.11.2010. By that emergency notice, it is the court’s opinion that the claimant’s services were thereby rendered redundant – at least on account of reorganisation for better efficiency and effectiveness towards achieving the SPA or better still, in view of the looming termination of the SPA as had been resolved by the 2<sup>nd</sup> respondent.

**Fourth**, the Court returns that the 2<sup>nd</sup> respondent never terminated the claimant’s employment. Notwithstanding the findings of the Court about the 2<sup>nd</sup> respondent having invoked clause 19 of the SPA, the Court finds that leave such as a compulsory leave in issue does not amount to a termination of employment. Thus the Court finds that it was misconceived to be submitted for the claimant that the 2<sup>nd</sup> respondent had terminated the claimant’s employment. Indeed, the claimant confirmed that he did not act in accordance with the 2<sup>nd</sup> respondent’s letters to go on compulsory leave but he instead wrote seeking the intervention of the Permanent Secretary.

**Fifth**, the Court finds that, contrary to the evidence by the 2<sup>nd</sup> respondent’s witness, the 2<sup>nd</sup> respondent’s Chief Executive Officer had the relevant authority to write the letters of 03.11.2010 and 22.11.2010. The letter of 03.11.2010 was clear that it was communicating the decision of the special 2<sup>nd</sup> respondent’s meeting of 22.10.2010. While failing to exhibit the record of that meeting, the 1<sup>st</sup> respondent’s witness sought to fault the authority of the Chief Executive Officer. It is the opinion of the Court that without exhibiting such record to show that at the special meeting there was no such resolution and without exhibiting the 2<sup>nd</sup> respondent’s resolution denying the resolution as was conveyed in the letter, prima facie the 2<sup>nd</sup> respondent made the resolution as was conveyed. The Court further finds that the subsequent letter of 22.11.2010 was an executive reminder on the implementation of the resolution as was conveyed in the letter of 03.11.2010 and the Chief Executive Officer must have enjoyed the general authority to issue such a letter by way of implementing and communicating the 2<sup>nd</sup> respondent’s resolutions. The Court finds accordingly and further that there was no personal culpability on the part of Eng. M.O. Ochieng as Chief Executive Officer in that regard.

**Sixth**, in view of the emergency notice and the ensuing expenses such as the claimant’s benefits if any, clause 19.3 of the SPA was clear thus, **“The cost of providing the services and complying with any Licensee directions during the period that the emergency notice is in effect will be borne from the Guarantee provided by the Service Provider to the Licensee.”** The Court returns that any monies payable to the claimant would be drawn from the guarantee the 1<sup>st</sup> respondent provided in that regard.

**Seventh**, the Court makes the following findings on the prayers made for the claimant:

1) The Court has already found that for inaction of the 1<sup>st</sup> respondent to comply with the emergency notice conveyed by the letter of 03.11.2010, the claimant was thereby constructively terminated from employment effective that 03.11.2010. The renewal was effective 01.10.2010. Thus as at termination the claimant had served for one month and three days. Up to the date of termination the claimant had been fully paid the agreed salaries and as per the letter to the permanent secretary, he had been paid up to 25.11.2010, despite the compulsory leave as proposed in the emergency notice. The claimant testified that he was employed by the Githunguri Water Company from December 2011 to 30.06.2013 earning Kshs. 140, 000.00. The claimant having obtained alternative employment and having not established diminished capacity to do so attributable to the 1<sup>st</sup> respondent, the Court once again returns that the claimant would not be entitled to 35 months’ pay for the remainder of the 3 years’ service. The prayer for Kshs.4, 550, 000.00 in that regard will fail.

2) The claimant is awarded gratuity for the one month served under the contract as had been renewed at 25% of Kshs. 130, 000.00 per month making **Kshs.32, 500.00**.

3) The claimant prayed for general damages but no submissions were made in that regard to guide the Court and the prayer is deemed to have been abandoned by the claimant.

4) Considering the parties' margins of success, each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties with orders the claimant to be paid **Kshs. 32, 500.00** from the guarantee provided by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent in terms of clause 19.3 of the Service Provision Agreement between the respondents dated 16.03.2007 and to pay by 01.09.2018 failing interest to be payable thereon at court rates from the date of filing of the suit; and each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 6<sup>th</sup> July, 2018.**

**BYRAM ONGAYA**

**JUDGE**