



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1044 OF 2015

ELIZABETH WAMBUI MBUGUA.....CLAIMANT

VERSUS

NATIONAL HOUSING CORPORATION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the statement of claim on 17.06.2015 through K. Mosei & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal from service of the claimant by the respondent was unlawful, illegal, unjust, null and void.
- b) The claimant has suffered loss and damages and be compensated as pleaded in paragraph 15 of the memorandum of claim Kshs. 15, 619, 846.35 together with interest from the date of the suit and broken down as:
 - i) Salary for unexpired period of contract of employment of 24 months at Kshs.317, 815.75 per month Kshs. 7, 627, 578.00.
 - ii) General damages for loss of employment opportunities Kshs.5, 000,000.00.
 - iii) Notice period Kshs. 317, 815.75.
 - iv) Gratuity for the contract period Kshs. 2, 164, 560.10.
 - v) Outstanding leave days Kshs.96, 978.50.
 - vi) Luggage allowance Kshs.25, 000.00.
 - vii) Leave travelling allowance Kshs. 387, 914.70.
- c) That the Honourable Court be pleased to assess exemplary damages for diminishing the claimant's employment opportunities.
- d) Any other relief or remedy as the Court may deem appropriate to grant.
- e) Costs of this suit.

The statement of response was filed on 20.07.2015 through Kiarie & Kariuki & Associates Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant filed a reply to the response on 13.08.2015.

The claimant was employed by the respondent as a legal officer on 12.09.1983 and was promoted to the position of Corporation Secretary in April 1994 which position she held until 28.06.2012. The respondent had on 28.06.2011 written to the claimant that she would serve upon a fixed term of 3 years effective 01.07.2011. The fixed term contract had been executed and was for 01.07.2011 to 30.06.2014 at Kshs. 317, 815.75 per month.

On 28.06.2012 the respondent dismissed the claimant from employment with immediate effect and the claimant was subsequently charged at the Anti-corruption court case No. 14 of 2013 and the respondent was the complainant. The dismissal letter addressed to the claimant on 28.06.2012 stated as follows.

“Dear Madam

RE: DISMISSAL FROM SERVICE

Reference is made to the Board Audit Committee report on irregular allocation of houses and subsequent investigation, review and interviews into the house allocation process by the Inspectorate of State Corporations and the Efficiency Monitoring Unit.

The reports identified cases of irregular allocations and found you culpable of misuse of office, conferring benefit, conflict of interest, improper enrichment and falsification of documents contrary to section 46 of the Anti-Corruption and Economic Crimes Act, 2003 and sections 11, 12, 17, and 19 of the Public Officer Ethics Act, 2003. This offence and your conduct is a fundamental breach of your obligation as an employee of the Corporation and provides justifiable grounds for dismissal from service in accordance with the Employment Act.

In view of this and in accordance with the decision of the Board of Directors on 12th March 2012, I hereby convey to you the decision to dismiss you from service with effect from the date of this letter. Please ensure you do proper handing over to the undersigned before leaving.

Any liabilities owing from yourself will be computed and advised to you.

Yours faithfully,

Signed

J.W. RUITHA, MBS

MANAGING DIRECTOR”

The claimant’s case is that the dismissal was unfair because she was not accorded a fair hearing prior to the termination; she was dismissed unheard; there was breach of clause 7 of the terms of employment in the contract of employment on discipline; the provisions of the Human Resources Manual (Revised March 2007) were not observed; and the respondent’s Board failed to follow due process in terminating the claimant’s contract of service.

The respondent’s case is that the claimant used her position as the Corporation Secretary and member of the House Allocation Committee (HAC) to influence the allocation of houses to herself and her relatives. She was therefore found culpable of misuse of office, conferring benefit, conflict of interest, improper enrichment and falsification of documents contrary to section 46 of the Anticorruption and Economic Crimes Act, 2003 and sections 11, 12, 17, and 19 of the Public Officer and Ethics Act, 2003. Further the decision to terminate the claimant was arrived at after extensive investigations and recommendations by the Efficiency Monitoring Unit and the Inspectorate of State Corporations. The respondent’s case is that the applicable terms and conditions of service as well as the relevant human resource policies were adhered to. Further, although the claimant’s conduct amounted to gross misconduct the respondent opted to simply terminate the contract instead of imposing summary dismissal.

The parties’ witnesses testified at the hearing. The Court has considered the pleadings, the evidence and the submissions on record and decides the issues in dispute as follows.

The **main issue** for determination is whether the termination of the claimant’s employment was unfair. It is clear from the pleadings and the evidence that prior to the termination, the claimant was not given a notice and a disciplinary hearing as envisaged in section 41 of the Employment Act, 2007. The claimant was charged in the Anti-corruption Court but was acquitted and the Court considers that the matters in the criminal case No.14 of 2013 were not directly mentioned in the termination letter so that the same will not be gone into in the present judgment.

However, the claimant noted that one of the co-accused was one Kaitany. He was suspended during the proceedings in the Anti-corruption Court and after acquittal, he was reinstated. It was the claimant’s evidence that she had been unfairly and discriminately treated. Thus there were double standards and the human resource manual had not been followed. The Court considers that such double standards would aggravate the respondent’s liability, if any, in terminating the claimant’s contract of service.

In cross examination the claimant testified that she had acquired some 5 houses in the course of her 29 years of employment built under the respondent’s affordable housing scheme. She further testified that her relatives had also acquired some houses like other ordinary Kenyans were entitled to do. The claimant admitted that 5 houses had been registered in her name and she had in 1996 got some houses registered in the names of her children. Nevertheless, the investigation report had found that there had been no policy capping the number of houses an employee of the respondent could buy from the respondent’s housing scheme.

The Court finds that the termination of the claimant’s employment was unfair for want of due process. The Court finds that the claimant had served for over 29 years, she desired to complete her three year fixed term contract, and she otherwise had a clean record of service. However, the Court considers that the claimant substantially contributed to her termination when she purchased several houses in the

affordable housing scheme and got the houses registered under her name. Though there may not have been a policy capping the number of houses she was to acquire, the Court considers that due prudence would have guided her as a senior officer in the respondent's employment of the likely impropriety of such acquisitions in the otherwise public scheme for affordable housing. The Court recalls the aggravating factor associated with double standards. To balance justice for the parties the Court places the claimant's contribution to her termination from employment at about 33%. Accordingly and under section 49 of the Employment Act, 2007 she is awarded 8 months' compensation at Kshs. 317, 815.75 making **Kshs.2, 542, 526.00** less the income tax payable. In the Court's opinion, the award is sufficient compensation flowing from the termination and in view of the possible maximum compensation under section 49 of the Act and the prayer for Kshs. 5,000,000.00 will fail as unjustified. The claimant was not accorded a termination notice per agreement or as per section 35 of the Act and is awarded **Kshs. 317, 815.75** as prayed for.

The Court has considered that the claimant has not established a reason attributable to the termination that made it impossible for her to engage in alternative gainful activities after the termination and the prayer for pay for the unexpired term of service will fail.

The parties agreed on gratuity at 31% of basic salary for the period served. The claimant had served for 12 months at Kshs. 193, 957.00 per month. Thus the Court awards her **Kshs. 721, 520.04.00** for gratuity as was agreed between the parties.

The claimant had served for 12 months and there was no evidence that she had taken the accrued leave and she is awarded **Kshs.96, 978.50** pay in lieu of annual leave as prayed for. The Court considers that the leave not having been taken, leave travelling allowance will be declined especially in view of clause 4.9 (iii) of the Human Resource Manual. Clause 4.8 of the Human Resource Manual entitles the claimant to **Kshs.25, 000.00** in luggage allowance as was prayed for and the claimant is awarded accordingly. No submissions were made on the prayer for exemplary damages and the same is deemed abandoned.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the dismissal from service of the claimant by the respondent was unlawful, illegal, unjust, and unfair.
- b) Payment of **Kshs.3, 703,840.29** by 15.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 26th October, 2018**.

BYRAM ONGAYA

JUDGE