



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1437 OF 2013**

**FRANCIS KARIMI MUGO..... CLAIMANT**

**- VERSUS -**

**NAIROBI CITY WATER & SEWAGE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> October, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.09.2013 through P.K. Mtange & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Prompt and full settlement of the balance of terminal dues to the tune of Kshs.7, 000,000.00.
- b) Special damages based on the amount the claimant was earning in his five (5) year contract with the respondent and for which the claimant had a reasonable expectation of its renewal for a further five (5) years term as compensation for loss of employment.
- c) Six months salary in lieu of notice.
- d) General damages for denting the claimant's career and reputation.
- e) Any other or further relief that the Honourable Court may deem just to grant together with the costs of this suit with interest thereon.

The respondent filed the reply to the claim and counterclaim on 29.08.2014 through Ochieng' Onyango, Kibet & Ohaga Advocates. The respondent counterclaimed that the respondent paid to the claimant the sum of Kshs.20, 078, 466.00 on terminal dues which sum constitutes an overpayment of Kshs.7, 910, 379.30. The respondent prayed that the claimant refunds the Kshs.7, 078, 466.00 being overpayment of terminal dues. The respondent further prayed that the claimant's suit be dismissed and the claimant to pay costs of his suit and the counterclaim.

The claimant filed answer to reply to memorandum of claim and reply to counterclaim on 29.02.2016. The claimant denied the counterclaim and prayed that it be dismissed with costs.

There is no dispute that the respondent employed the claimant as its managing director at all material time. On 19.06.2007 the respondent renewed the claimant's contract of service for a period of 5 years effective 17.08.2007 – the five years were therefore lapsing on or about 17.08.2012. The claimant's employment was terminated by the letter dated 06.07.2011 signed by Peter Kuguru, The chairman of the respondent's board. The letter stated as follows:

“Dear Sir,

**Re: Termination of Contract of Employment**

**We refer to the above and your contract of employment signed and dated 19 June 2007.**

**Following the meeting between yourself and Finance, Administration & Communication Committee at Red Court Hotel on 17 May 2011, The Board of Directors met on 5 July 2011, and resolved to terminate your contract of employment as provided under Clause 8 and 9 therein. The termination is effective immediately. You are entitled to all your dues as provided under your contract upon clearance with the Acting Managing Director.**

**We take this opportunity to thank you for your good service to NCWSC and wish you similar success in your next engagement.**

**Yours faithfully,**

**Signed**

**Peter Kuguru (Mr.)**

**Chairman”**

Clause 8 of the contract provided that either party could terminate the contract of employment by serving the other party a 6 months' notice or paying 6 months' gross salary in lieu of notice. Clause 9 provided that if the respondent's board terminated the contract, subject to statutory deductions and compensation for loss of employment, the claimant would be paid gross salary, benefits and allowances for the entire period not served under the contract based on the gross monthly salary ruling at the point of termination, an amount equivalent to all leave accrued but not taken by him at the date of such termination and six months gross salary in lieu of notice together with a pro-rata of emoluments set out in clause 4 of the agreement. Clause 4 provided for the payments and benefits due to the claimant under the contract of service.

On 17.10.2018 by consent of the parties the Court ordered, **“By consent suit be determined on basis of pleadings and documents on record. Claimant to file and serve submissions by 20.08.2018 and respondent by 20.08.2018. Mention on 17.10.2018 9.00am for directions on judgment. Costs in the cause.”** On 17.10.2018 the parties had not filed submissions as was directed by the Court. The Court fixed the suit for Judgment.

The only issue for determination is whether the parties are entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant has prayed for prompt and full settlement of the balance of terminal dues to the tune of Kshs.7, 000,000.00. The claimant pleaded that part of the terminal dues had been paid irregularly and the claimant was still owed the amount claimed. There was no breakdown of the amount paid and the unpaid amount together with the headings or votes of the claim. The Court returns that the claim is for special damages whose particulars have not been specifically pleaded and evidence provided. There were no submissions to justify the claim. The Court returns that the prayer will fail.

b) The claimant prays for special damages based on the amount the claimant was earning in his five (5) year contract with the respondent and for which the claimant had a reasonable expectation of its renewal for a further five (5) years term as compensation for loss of employment. The prayer is for special damages whose particulars and computation has not been pleaded and established by way of evidence. The Court further finds that the claimant has not established or provided for the alleged expectation that the 5 year contract would be renewed. The prayer will therefore fail.

c) The claimant prays for six months salary in lieu of notice while at the same time pleading that part of the terminal dues had been paid. The respondent has exhibited documents showing that the claimant was paid Kshs. 26, 552, 632.00 in terminal dues which is said to have included pay in lieu of termination notice as had been agreed. The claimant's demand letter dated 11.10.2012 did not include a demand for payment of 6 months in lieu of notice. The letter shows that the claimant had demanded pay in lieu of leave the claimant alleged had accrued in view of six months notice but which had not been served – and which demand is not part of the claims and prayers in the present suit. In absence of any other evidence, the Court returns that the claimant was paid in lieu of the 6 months' notice as was agreed and the prayer is declined.

d) The claimant prays for general damages for denting the claimant's career and reputation. The Court finds that there was no evidence and submissions to justify the prayer and the same will fail.

e) The respondent counterclaimed for a refund by the claimant of overpayment of **Kshs.7, 910, 379.30**. Under section 90 a cause of action arising from a contract of service must be instituted within 3 years. In this case the contract of service was terminated by the letter dated 06.07.2011 and with immediate effect. The 3 years of limitation were ending on or about 06.07.14 and the counterclaim was filed belatedly on 29.08.2014. The Court returns that the counterclaim was therefore time barred. In any event, there were no submissions or evidence to establish the counterclaim. The Court returns that the counterclaim and prayer will fail.

In conclusion judgment is hereby entered for the parties for:

- a) Dismissal of the memorandum of claim.
- b) Dismissal of the counterclaim.
- c) Each party to bear own costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**