



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 38 OF 2018

(Before D. K. N. Marete)

ARTHUR NJUGUNA KAROGI.....CLAIMANT

VERSUS

THE NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND BOARD.....RESPONDENT

JUDGEMENT

This matter was brought to court vide a Statement of Claim dated 30th April, 2018. It does not disclose an issue in dispute on its face.

The respondent in a Memorandum of Defence dated 27th June, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant in a Reply to Memorandum of Defence dated 6th July, 2018 amplifies his case in answer to the memorandum of defence.

The claimant's case is that at all material times to this claim, he was an employee of the respondent on a renewable contract terms as a Fund Account Manager. He faithfully and diligently served in various constituencies within the Republic of Kenya.

The claimant's further case is that in the course of his employment the respondent falsely, maliciously and unlawfully alleged that through an audit carried out in the Old Molo Constituency for the financial year 2013/2014 it was established that there were fraudulent activities leading to the loss of millions of money. As a consequence and vide a letter dated 28th December 2015 the

claimant was unlawfully interdicted and subsequently followed by a letter of non renewal of contract dated 25th November, 2016. This, he avers, is contrary to the provisions of the Constitution, the Employment Act, the Labour Relations Act and all attendant rules. These acts are illegal, arbitrary, unprocedural, irregular and or lack any substantive investigations and the same is tainted with unexplained malice and vindictiveness. This is expressed as follows;

7. The claimant further states that the process is leading to the interdiction and the subsequent non-renewal of the applicant's contract was not transparent, impeccable, free and fair and that any allegations on impropriety are unfounded, baseless and or unsubstantiated

The claimant's other case is that he was overall not afforded a fair hearing as enshrined under Article 50 of the Constitution of Kenya, 2010.

He claims as follows;

a. A declaration that the claimant's dismissal from employment was unfair and unlawful hence null and void and thus an order do issue for his reinstatement to his employment without loss of benefits.

b. An order of payment of loss of remuneration calculated at the rate of the claimant's remuneration per month from the month of January 2016 as per the tabulation in paragraph 10 herein above till the date of reinstatement and or full payment together with gratuity at the rate of 31% of the basic salary on the number of years of service.

c. Costs of the claim together with interest at court rates.

d. Any other relief that this honourable court may deem fit and just to grant.

The respondent's case is a denial of the claim.

It is her further case that she undertook routine internal audit of the CDF Fund which revealed massive misappropriation of Kshs.40,598,113.60 being public funds paid without any undertakings on projects under the claimant's tenure as a Fund Account Manager in Molo constituency. The claimant had failed, neglected and or refused to exercise due diligence and ensure that the confirmation of projects and implementation of the same before processing payments. She puts it thus;

7. As an accounting officer of the constituency the Claimant had a statutory obligation and a legal duty to ensure that payments are made only for projects that have been undertaken. The Claimant failed in his duty where he was trusted with public funds. Ultimately, he failed to exercise his duty diligently and faithfully as required.

9. On 8th July, 2015 the Respondent communicated the audit results to the Claimant. The audit revealed that payments were made for projects which were never done. Further, it was revealed that Kshs.40,598,113.60 was made for work not performed. The Respondent issued the Claimant with a notice to show cause, of which he was required to respond within 14 days.

13. The Claimant was accorded every opportunity to defend himself. He made written submissions and appeared before a disciplinary committee of the Board. The same is confirmed by Claimant's admission at paragraph 7 of the Supporting Affidavit.

The matter came to court variously until 20th July, 2018 when the claimant's case was heard *ex-parte*. The respondent was absent at the hearing, despite service.

The issues for determination therefore are;

1. Was there a termination of the employment of the claimant by the respondent?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether indeed there was a termination of the employment of the claimant by the respondent. The claimant in his written submission dated 5th September, 2018 submits a case of wrongful, unfair and unlawful termination of employment. It is his submission that his interdiction and non renewal of contract was unlawful since he was no awarded a fair hearing. This was in contravention of section 41 of the Employment Act, 2007 as follows;

“(a). That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(b). That the employer has heard and considered any explanations by the employee or their representative.” emphasize supplied

On this, he seeks to rely on the authority of **Elizabeth Washeke and 62 others v Airtel Networks (K) Ltd & Another [2013]eKLR** which authority he chooses not to elaborate.

The respondents in their written submissions dated 8th October, 2018, the eve of this judgement of court reiterates her case as set out. This is by a serialization and sequence of events outlining the claimant's performance or lack of it at his work place, all leading to his dismissal.

The respondent further seeks to rely on the authority of National Government Constituencies Development Fund Act, 2015 which at Sections 12(3), (5) and 56 clearly outline the procedure for utilization of CDF Funds and also for dispute resolution where this arises. This applies to the situation we are now in.

The respondent further seeks reliance on section 47 (5) of the Employment Act, 2007 and submits that the claimant has not satiated his burden of proving unfair termination of employment. It her case that in as much as the claimant's case of fraudulent conduct is still pending, there is not existing contract between the parties and therefore a case of reinstatement would not be feasible in the circumstances. This would also jeopardize the respondent's overtures at investigations and ultimate resolution of the issue of the claimant's fraudulent misconduct leading to loss of funds. This is as follows;

14. The respondent submits that the orders for reinstatement as intimated under prayer 2 puts the respondent in an awkward and vulnerable position since the claimant's conduct is yet to be ascertained. Further the respondent fears that investigations will be interfered with and urges this honorable court to tread this ground with extra caution. Further, the respondent does not have an existing contract with the claimant.

15. The honorable court should further note that if damages are awarded to the claimant, the respondent might be unable to recover

the lost money. It will be akin to double award for the claimant at the expense of the respondent.

16. Given that his contract has expired, the respondent cannot be compelled to reinstate the claimant as there is no express provision in the NGCDF Act addressing the circumstance and further there is no existing contract between the claimant and the respondent.

17. The respondent has gone ahead to furnish this court with useful information and documentary evidence which will assist it in

arriving at an informed decision. The respondent has clearly demonstrated that the claimant is not seeking equity with clean hands.

The respondent's case is elaborate and overbearing. She walks the court through the travails and misadventure of the claimant in the course of his employment. The claimant was employed as a Fund Account Manager, a position which required prudent management and utilization of public resources and funds in the Constituency Development Fund. He did not honour this. Instead, he was implicated in massive fraud amounting to Kshs.40,598,113.60 during his tenure at Molo Constituency. He was not able to account or explain this anomaly.

The claimant was taken through appropriate disciplinary proceedings whereby he was implicated in this fraud. In the course of this, his contract of service expired and the matter was raised with the Ethics and Anti-corruption Commission. This expiry of contract was the basis of the cessation of the employment of the claimant and this was communicated to him vide a letter 25th November, 2016. There is therefore no basis for a case of unlawful termination of the employment of the claimant, or at all.

I agree with the case of the respondent. Nothing whatsoever betrays a case of unlawful termination of employment. What with clear unanswered issues of fraud involving public funds which remain unsettled even after subjecting the claimant to formal disciplinary proceedings? Moreover, the claimant's case is one of interdiction and non-renewal of a lapsed contract. This is not termination of employment as envisaged by the claim.

I also agree with the submissions of the respondent that the claimant is not seeking equity with clean hands. He does not fulfill the maxim of equity that *he who comes to equity must come with clean hands*. His hands are tainted to the extreme. His activities and misconduct at the work place speaks volumes about him and this claim. I therefore find a case of no termination of the employment of the claimant by the respondent. His contract of service merely lapsed and was

not considered for renewal. Period.

With a finding of no termination of employment, the claimant becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Orina instructed by E.M Orina & Company Advocate for the claimant.
2. Mr.Muchella holding brief for Mr. Omenya instructed by Munyao, Muthama & Kashindi Advocates for the respondent.