



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 188 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DR (ENG) KABOK PETER AGUKO.....CLAIMANT

-Versus-

LAKE BASIN DEVELOPMENT AUTHORITY.....RESPONDENT

J U D G M E N T

By his statement of Claim dated 30th June, 2016 the Claimant avers that he worked for the Respondent for a period of 26 years rising through the ranks until 2011 when he was appointed as the Managing Director of the Respondent on a 3 year contract. He states that the contract was renewed on 6th January, 2014 by the appointing authority, the Cabinet Secretary, Ministry of Environment, Water and Natural Resources for a further term of 3 years.

The Claimant avers that his performance was exemplary as exemplified by the many achievements of the Respondent, under his leadership including the following -

- i) Placed the Respondent on a sustainable path and foundation through effective initiation and implementation of key development projects.
- ii) Ensured prudent operations and management of the Authority through **ISO:9001:2008** Certification that will transform the Authority in conformity with global best practices and realize value for investment.
- iii) Led the Authority towards sustained improved performance at very good performance rating for the period of the first contract.
- iv) Achieved improved Revenue Collection Generation (A in A) capacity from 41 million in 2009/2010 to 104 million in 2012/2013.
- v) Enhanced net worth of the Respondent from 860 million in 2009/2010 to 1.2 billion in 2012/2013.

The Claimant avers that on 5th June 2015 there was a falling-out between him and the Board of Directors which resulted in his interdiction by the Chairman of the Board on 8th July, 2015.

By letter dated 19th October, 2015 the Claimant's interdiction was lifted and his contract terminated but

subject to payment of the balance of the unexpired term from date of termination to 5th January, 2017.

The claimant avers that by letters dated 25th November and 28th December, 2015 the Respondent informed him that his benefits were being worked out and once finalised, would be paid. The claimant avers that by letter dated 25th April, 2016 he was informed of termination of the tenancy agreement for Respondent's premises where he was residing and by letter dated 28th April, 2016 he was required to hand over all property of the Respondent by 12th May, 2016. By another letter dated 2nd May 2016 he was advised to vacate the house by 30th June, 2016 following termination of the tenancy.

It is the Claimant's position that he is entitled to be provided with housing by the Respondent until 5th January, 2017 and that in any event his continued occupation of the house is due to the failure of the Respondent to pay his terminal dues. The Claimant tabulated his terminal dues at Shs.13,622,211.70. He seeks the following remedies -

- i) A declaration that it is unfair, illegal and unlawful for the Respondent to hold onto the Claimant's terminal benefits despite predetermination of the letter of contract way back on 19th October, 2015;
- ii) Kshs.13,622,211.70 as particularized in paragraph 20 of the Statement of Claim;
- iii) Any order or prayer as the Court may deem fit and expedient in the circumstances of the case.
- iv) Costs of the suit.

Together with the Statement of Claim, the Claimant filed a notice of motion under certificate of urgency seeking the following orders -

1. **THAT** this application be certified urgent and be heard ex-parte in the first instance.
2. **THAT** pending the hearing and determination of this application, the Respondent, whether by itself, agents, servants and/or any other person deriving its authority be restrained from evicting the Claimant from or interfering with the Claimant's quiet possession of all those premises being House HG 84, Millimani, Kisumu city, currently occupied by the Claimant pursuant to his contract of employment dated 7th April, 2014.
3. **THAT** pending the hearing and determination of this cause or earlier payment of the Claimant's dues under the contract dated 7th April 2014, the Respondent whether by itself, agents, servants and/or any other person deriving its authority be restrained from evicting the Claimant from or interfering with the Claimant's quiet possession of all those premises being House HG 84, Milimani, Kisumu City, currently occupied by the Claimant.
4. **THAT** the costs of this application be in the suit.

The Respondent filed a replying affidavit in which it states that it has no obligation to provide housing to the claimant after the termination of his employment contract and that the claimant's terminal dues had not been paid due to the fact that while in office the claimant initiated the release of his Provident Fund together with Respondent's contributions thereto in the sum of Shs.2,698,240. It is further stated in the replying affidavit that the claimant is not entitled to gratuity as his contract was terminated midstream. It is further deposed that after tabulation of his terminal benefits the claimant owes the Respondent a sum of Shs.2,698,821.20.

The Respondent prays that the application be dismissed.

In its response to the claim the Respondent states in a report of the committee of the board on corporate governance dated 21st July 2015 recommended the termination of the Claimant's employment. That in a meeting held on 22nd July, 2015 the Respondent's Board recommended the summary dismissal of the

Claimant and conveyed the resolution to the Cabinet Secretary by letter dated 23rd July, 2015. The Respondent further states that the report of a parallel inquiry initiated by the Ministry of Environment, Natural Resources and Regional Development dated August, 2015 recommended that the Managing Director be allowed to complete his term.

The Respondent states that at its Board meetings held on 4th and 8th April 2016, the letter of the Cabinet Secretary dated 19th October, 2015 was deliberated and a resolution passed to the effect that paying the Claimant for the unexpired term of his contract is not supported by law. It further states that the Respondent's Board of Management is under the "Muongozo Code", independent and is expected to exercise independent judgement in the discharge of its duties and take full responsibility for compliance in the discharge of its duties.

The Respondent states that it has already worked out the Claimant's terminal dues which indicates that the Claimant owes the Respondent the sum of Shs.2,509,755.20. The Respondent prays that the Claimant's suit be dismissed with costs.

When the claimant's application came up for hearing the parties agreed to maintain status quo by allowing the claimant to occupy the premises leased by the Respondent and to proceed with the main claim by way of written submissions. In the submissions filed thereafter the parties reiterated their positions in the pleadings and affidavits.

Determination

The facts of this case are not in dispute. The Claimant was appointed as the Respondent's Managing Director on a 3 year fixed term contract in January 2011. The contract was upon expiry renewed for a further term of 3 years on 6th January 2014. He was interdicted on 8th July, 2015 on various grounds but after investigations, the interdiction was lifted by letter dated 19th October, 2015 which also terminated his employment. The letter is reproduced below -

NHIF BUILDING

RAGATI ROAD

P O BOX 30126-00100

NAIROBI

19th October, 2015

Dr. Eng. Peter Aguko Abok (Phd.), C.E.

Managing Director

Lake Basin Development Authority

P O Box 1516 - 40100

KISUMU

RE: LIFTING OF INTERDICTION AND PREDITERMINATION OF CONTRACT OF MANAGING DIRECTOR - LAKE BASIN DEVELOPMENT AUTHORITY

The Ministry's letter of Ref. No.MRD/LBDA/7/7/Vol.11/49 of 8th July,2015 addressed to you refers.

In this regard and following the recommendations of the Board of Directors Full Board Meeting held on 1st and 2nd October 2015, your interdiction is hereby lifted and you are required to

proceed on early exit from the office of Managing Director, Lake Basin Development authority.

In view of the above, your existing contract with the Board was predetermined and terminated.

The Authority will pay you the balance of your unexpired term on the contract from the date of the pre-determination on 1st October 2015 up to and including 5th January, 2017 being the date of the expiry of the predetermined contract. This will be subject to your clearance of any liabilities arising thereof.

By copy of this letter the Ag. Chairperson of the Board of Directors is required to ensure that the Board's recommendations are effected in accordance with the laid down regulations and procedures.

Pros. Judi W. Wakhungu

CABINET SECRETARY

The contents of the letter are unequivocal. It states that the letter is written pursuant to the recommendations of the Respondent's board meeting held on 1st and 2nd October 2015. It states that the Claimant will be paid for the unexpired term of the contract up to 5th January, 2017. The only condition is that the claimant clears any liability arising from the contract.

The Respondent's averments to the effect that the Board reviewed the decision of the cabinet Secretary is to say the least, dishonest and an attempt to back-track on the Board's own resolutions communicated to the Cabinet Secretary upon which the Cabinet Secretary acted to the detriment of the Claimant. Once the letter of termination was delivered to the Claimant, nothing the Respondent did can thereafter change the contents of the letter. In other words, the Respondent is estopped from denying or derogating from the contents of the letter of termination of the claimant.

The Respondent's vain attempts to run away from the commitments in its letter are but mere protestations with no legal effect. The only issue for determination is therefore the tabulation of the terminal dues payable to the Claimant for the remainder of his contract term of 15 months.

The Claimant made his tabulations amounting to Shs.13,622,211.70 while the Respondent has two different tabulations, one with a credit balance of Shs.1,514,432.3 and another with a debit balance of Shs.(2,509,755.20). The fact that the Respondent has two different figures of terminal benefits payable to the Claimant further emphasises the lack of seriousness with which it has handled this matter.

The Claimants terminal benefits as stated in the letter of termination should include his gross pay, that is salary and allowances, his gratuity, his leave and the salary withheld during interdiction.

He is thus entitled to payment as follows -

1. Salary withheld in July, August and
September, 2015 Shs. 342,742
2. Gross Salary for October, 2015 Shs. 390,000
3. Gross Salary from November 2015 to
December 2016 at Shs.390,000 per month Shs.5,460,000
4. Gross Salary from 1st to 5th January, 2017 Shs. 65,000
5. 60 Leave days (based on

basic salary of Shs.250,000)	Shs. 500,000
6. Gratuity @ 31% of basic salary	Shs.2,790,000
7. Provident Fund	

The Claimant's contract at Clause 8.3 provides as follows with respect to Gratuity-

"In the event that the CEO/MD is on secondment or is a member of some other retirement benefit scheme he may opt to continue with the retirement benefit scheme to which he is already a member."

The contract does not state that the Respondent will not pay contributions to the Provident Fund should the Claimant opt to continue. Having already paid the Provident Fund contributions, the Respondent cannot validly recall the same, as this is prohibited by the Retirement Benefits Rules made under the Retirement Benefits Act. The Respondent's attempt to deduct the sum of Shs.2,698,240 from the claimant's terminal benefits is therefore without legal basis.

The Claimant is also not entitled to payment of contributions by the Respondent for the Provident Fund as he ceased being a member thereof upon his withdrawal of benefits from the Fund following his letter dated 2nd November, 2015 which was acted upon by the Respondent and payment duly released to the Claimant.

Medical Cover

According to his contract the Claimant was entitled to medical insurance as per scheme rules. He is not entitled to any payment as under the medical scheme he was only entitled to medical treatment upon falling sick and not the cash value of the medical insurance cover.

Refund for Stolen TV

The Claimant has not proved that he lost a TV worth 250,000 or that he was entitled to reimbursement made by the security company to the Respondent. What he should have done is to claim refund of the value of the lost TV from the Respondent immediately upon the payment by the security company.

The claim is dismissed.

Transport Upon vacating House

The Claimant's Contract does not provide for transport upon expiring of contract. He has not produced any evidence that he was entitled to the same. The prayer is dismissed.

Casual Employees, Alarm Security, Utilities Bill

These are benefits that the Claimant would only be entitled to while working for the Respondent. Since his contract was terminated in October 2015, he is not entitled to the same.

Commuter Allowance

The Claimant's Contract provides that he would be entitled to an official car and would only be entitled to commuter allowance during leave. Having been paid commuted leave for 60 days, I award him commuter allowance for equivalent period being 2 months at Shs.120,000.

Payment for Trip to Germany and Retirement of Imprest

The Claimant has claimed payment of Shs.194,339 on account of approved payment for a trip to

Germany from 10th to 20th July, 2015. The Claimant should claim this from the Respondent in the normal manner and the same should be paid as it should have been done were he still in employment of the Respondent.

The Respondent has claimed a sum of Shs.670,000 being unretired imprest. The Claimant is directed to retire the said imprest in the normal way as would have been done were he still in employment of the Respondent. This will be considered as part of his clearance with the Respondent.

I hasten to add that all payments claimed by the Respondent should have been the subject of a counterclaim which the Respondent did not file. For this reason should there be no agreement on retirements of imprest of Shs.670,000/- the Respondent will not be allowed to recover the same from the Claimant as it has not been proved, but it may claim the same in a separate suit against the Claimant.

Conclusion

In conclusion, I enter judgment for the Claimant against the Respondent in the sum of Shs.9,196,742.

This is in addition to the claim for Shs.194,339 for the trip to Germany which I have directed should be dealt with as would have been done had the Claimant been in employment.

The Respondent shall also pay Claimant's costs for this suit. The decretal sum shall attract interest at court rates from date of judgement unless payment is made within 30 days.

Dated and signed and delivered this 23rd day of February, 2017

MAUREEN ONYANGO

JUDGE