



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
PETITION NO 116 OF 2016

STANLEY KERANDI MANDUKU.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

JOHN NGUMI2ND RESPONDENT

RULING

1. By a motion dated 15th August, 2016 the claimant sought orders among others that:

a. That temporary conservatory order be and are hereby issued by way of an injunction restraining the respondents by themselves, or anyone of them, their agents, servants or otherwise howsoever from filling the petitioner's position of employment of Chief Legal Officer pending the hearing and determination of the application and the petition herein.

b. That stay of execution be and is hereby granted on the termination letter dated the 5th August, 2016 addressed to the applicant by the respondents pending the hearing and determination of the petitioners application and the petition herein.

c. That an order of judicial review in the nature of certiorari to bring into this honourable court the termination letter dated 5th August, 2016 addressed to the applicant for the purposes of being quashed.

d. That upon grant of prayers number 3 and 4 above, the petitioner be and is hereby reinstated at the 1st respondent pending the hearing and determination of the application and the petition herein.

2. The application was supported by the affidavit of the applicant in which he deponed on the main that:

a. That I was engaged in employment with the 1st respondent on the 15th April, 2010 in the position of Senior Legal Officer Job Group 4 in its Legal and Secretariat Department.

b. That out of my due diligence, professionalism, responsibility and dedicated service, I rose through the ranks and was appointed to the position of Chief Legal Officer Job Group 3 vide the appointment letter dated the 15th May 2014. The appointment took effect on 4th April, 2015.

- c. That I have in a number of occasions been appointed to act as company secretary when the incumbent was away or for the period she acted as Acting Managing Director with effect from 7th April, 2015 to 22nd December 2015.
- d. That since my appointment both initial and after promotions, I have conducted my duties as an employee of the 1st respondent with utmost diligence, commitment, responsibility, industry and reverence in accordance with the specifications of my employment.
- e. That I know the 2nd respondent, who is the Chairman of the Board of Directors of the 1st respondent having been appointed on 17th April, 2015.
- f. That I am aware that on 30th April, 2015 the 2nd respondent was issued with a letter of appointment from the Chief of Staff and Head of Public Service outlining his job description as the non-Executive Chairman of the Board of Directors of the 1st respondent, appointed pursuant to section 6(1) (a) of the State Corporations Act.
- g. That I am aware that the nature of his appointment precludes him from being a member of the executive management team of the 1st respondent and therefore not allowed by operation of the law to undertake executive and operational functions of the 1st respondent.
- h. That on the 1st February 2016, I received a letter from the 1st respondent signed by the 2nd respondent purportedly sending me on compulsory leave on pretended allegations of attempted alteration of board minutes (albeit drafts) of the Board Human Resources Committee Meeting on 2/2015-16 held on the 20th November, 2015.
- i. That further and without prejudice to the foregoing, out of my personal knowledge and my acquaintance with the Kenya Pipeline Staff Rules and Regulations, there is no provision for sending me (or any employee) on compulsory leave and thus my subjection to compulsory leave by the respondent was illegal, unconstitutional and repugnant to the provisions of the Employment Act as well as the Kenya Pipeline Staff Rules and Regulations.
- j. That the 2nd respondent vide a letter dated the 13th April 2016 sought my written explanation on the allegations aforesaid albeit with an additional trumped up allegation of issuing instructions to external lawyers in Misc Judicial Review No 256 of 2015 Republic Vs Public Procurement Appeals Review board, Civicon Limited and Kenya Pipeline Company Limited exparte JGH Marine A/S of which my written explanation was as well sought and which letter was again authored by the 2nd respondent.
- k. That vide a letter dated the 14th April, 2016, I made a comprehensive explanation in response to the demand made by the 1st respondent as aforesaid.
- l. That the 2nd respondent vide a letter dated the 16th May 2016 purported to invite me to a personal hearing scheduled to take place on the 23rd May 2016 wherein I was expected to appear before the Board Human Resource Committee for the said hearing.
- m. That the respondents vide their letter dated the 5th August, 2016 purported to terminate my employment on the purported ground that my explanation to the allegations levelled against me were unacceptable and I was purportedly held culpable by the respondents jointly and severally.
- n. That I am aware that there exists Kenya Pipeline Staff Rules and Regulations which facilitates efficient and economic service to the 1st respondent and the general public and provide for fair, transparent and equitable system of human resource administration and management with the 1st respondent.

o. That further and without prejudice to the foregoing, the respondents in their purported hearing never accorded me an opportunity to be heard when they failed to supply me with my accusers statements in order that I may respond appropriately and controvert the same as provided in the 1st respondent's Staff Rules and Regulations clause 8.3.2 thereof.

p. That further and without prejudice to the foregoing, it is clear though as to who made the allegations against me and is the 2nd respondent herein in connivance with like-minded Board members and who are the architects and who orchestrated the malicious actions against me with the complacency of the 1st respondent and thereby meting caprice, odium and vendetta upon me without any lawful justification at all.

3. The respondent opposed the application and filed an affidavit through one Gloria Khafafa in which she deponed on the main that:

a. That the petitioner was engaged in employment with the 1st respondent as the Senior Legal Officer from 15th April 2010 and as the Chief Legal Officer from 4th April 2014 upto 5th August 2016 when his services were lawfully terminated for gross misconduct.

b. That the petitioner also served as the 1st respondent's company secretary in acting capacity from 17th April 2015 to 1st February 2016 when he was relieved of his duties to pave way for investigations into his gross misconduct, the subject of the petition.

c. That the 2nd respondent is the Chairman of the board of Directors of the 1st respondent.

d. That the petitioners employment was governed by a contract of employment the Kenya Pipeline Staff Rules and Regulations and the Laws of Kenya relating to employment.

e. That it was an express term of the petitioner's contract of employment that he would perform his duties diligently and faithfully as well as adhere to the Corporations Rules and Regulations.

f. That it is not denied the Board Human Resources Committee (BHRC) held a meeting on 20th November, 2015 and the petitioner being the acting Company Secretary recorded the minutes of the said meeting No 2/2015-16.

g. That the petitioner in recording the said minutes inserted the following item that had not been discussed **“Mrs Flora Okoth, the current acting Managing Director to continue acting as such until further notice”**.

h. That the item had far reaching implication as it had the effect of irregularly extending the term of the then Acting Managing Director.

i. That the 1st respondent held a special Board meeting No 4/2015-16 on 17th December, 2015 and continued on 27th January 2016 where the petitioner's action was discussed and a decision made to relieve the petitioner of his duties as the Acting Company Secretary and to send him on compulsory leave to allow further investigations into his conduct and the decision was communicated to the petitioner vide the letter dated 1st February 2016 as contained in paragraph 11 of the petitioner's affidavit.

j. That contrary to the allegation contained in paragraph 12 of the petitioner's supporting affidavit, the Kenya Pipeline Staff Rules and Regulations provides for interdiction of an employee from duty pending investigations and consideration of an offence where such offence may lead to termination of service.

k. That the investigations done revealed that in addition to the improper insertion made by the

petitioner in the BHRC minutes No 2/2015-16 the petitioner circulated the said minutes to the Human Resource Management for implementation with the improper insertion and without approval by the Board.

l. That the investigations also revealed that the petitioner had greatly compromised the company's interest in the cases Nai HC JR No 256 of 2015 and HC JR No. 258 of 2015 when he issued unilateral instructions to the 1st respondents counsel to enter into a consent to allow the winning bidder enter into a sub contract agreement with a party to the dispute who had failed to meet the tender technical specifications set out by the 1st respondent in blatant disregard and violation of the Public Procurement and Disposal Act, without consulting the 1st respondent's Tender Committee or without seeking independent and proper advise on the same thus exposing the 1st respondent to litigation and other grave penal consequences.

m. That the petitioner did not heed advice from the external advocate to seek guidance from the Tender Committee on the proposed consent.

n. That the 1st respondent further sought an independent opinion from the Public Procurement Board on the legality of the proposed consent and the Public Procurement Board confirmed that the same was illegal.

o. That the said winning bidder further sought to proceed with the contract after incorporating the losing bidder in blatant disregard of Public Procurement laws, thus exposing KPC to threats of litigation by the winning bidder's joint venture partner.

p. That the petitioner's actions were found to be gross misconduct that warranted summary dismissal.

q. That the petitioner was informed of the allegations against him in clear and concise terms as admitted in his application vide the letter dated 13th April, 2016.

r. That the petitioner was accorded a fair hearing.

s. That the petitioner was invited to make a written explanation to show cause why disciplinary action ought not to have been taken against him and the petitioner did so elaborately vide his letter dated 14th April, 2016 as he has admitted in paragraph 15 of his supporting affidavit.

t. That the petitioner was further invited for hearing of the case which he has admitted that he attended.

u. That the petitioner willfully submitted himself to the disciplinary procedure and did not raise any grievance with regard to his case being heard by the Board of Human Resources Committee or the complaint with regard to the correspondence signed by the 2nd respondent either in his written explanation, during the hearing or at all hence raising it in court is misplaced, a mere after thought and is aimed at confusing this Honourable Court about the real issues in dispute.

v. That all allegations of the disciplinary process having been actuated by malice, connivance, ill-motive personal vendetta or bias or impartiality are spurious and baseless as the 1st respondent has established that there was good and lawful cause to subject the petitioner to disciplinary action.

4. This is an interlocutory application and the court must be careful not to delve too deep into the merits and demerits of the reasons and process followed in the termination of the applicant's services. All the court needs to be satisfied about at the moment is whether the applicant has made out a prima facie case with any probability of success and if so, would the loss suffered if he is ultimately successful in the main claim be impossible to adequately recompense by an award of damages.

5. The applicant has already been terminated from the respondent's employment he however contests the reasons and process of the termination. According to him the termination was malicious, discriminatory and actuated by personal vendetta against him. The respondent on its part felt as set out in the affidavit of Gloria Khafafa that the acts or omission and commission by the petitioner constituted valid reasons for the termination of his services.

6. The petitioner does not seem to refute the occurrence of the allegations against him. His main contention is that he is not responsible or that they occurred with the approval of the respondent. The validity or otherwise of this contention can only be known after the final hearing and determination of the petition.

7. In the petition the petitioner seeks among others a declaration that the entire process leading to his dismissal was unlawful and unconstitutional. He therefore seeks Judicial Review orders to quash the decision to dismiss him and an order for his reinstatement to employment. In the alternative the petitioner seeks an order for compensation for loss of employment upto retirement age of 60 years. He further seeks aggravated damages for harm to his reputation, hurt feelings and damage to self esteem.

8. From the foregoing the petitioner acknowledges that same measure of damages can be awarded to him if successful in the petition. It would therefore not be necessary to restrain the respondent from filling the position left vacant following the termination of the petitioner's services.

9. Employment relationship is contractual like any other contract. It can be brought to an end by honour or breach. Where breach occurs damages are always assessable and payable to the offended party. Specific performance as a remedy is usually ordered in special and rare cases. So is an order of reinstatement.

10. The court is therefore of the view that justice can still be done to the petitioner if found to have been wronged by the respondent without interdicting the respondent from recruiting someone else to take up the position left vacant following the termination of the claimant's services.

11. In conclusion the court finds that the application is not merited and dismisses the same with costs.

12. It is so ordered.

Dated at Nairobi this day of2017

Abuodha J. N.

Judge

Delivered this 28th day of April 2017

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge