



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 16 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ENG. ALFRED ODONGO AMOMBO.....CLAIMANT

-Versus-

LAKE VICTORIA NORTH WATER SERVICES BOARD.....1ST RESPONDENT

HON. JOSEPH KIPCHUMBA LAGAT.....2ND RESPONDENT

JUDGMENT

The Claimant is the Chief Executive Officer of the 1st Respondent having been appointed on a 3-year contract commencing 2nd May 2016. The 1st Respondent is a one of the eight water services boards established under section 51(2) of the Water Act as part of the reforms in the water sector with the mandate of ensuring efficient and economical provision of water and sewerage services within their respective areas of jurisdiction. The Respondents head offices are in Kakamega.

The 2nd Respondent is the chairman of the 1st Respondent's Board of Directors.

On 19th August 2016 the 1st respondent's board met under the chairmanship of the 2nd Respondent and resolved among other resolutions that Ms. Naomi Jelimo, the Manager, Human Capital and Planning would replace Mr. CPA Frederick Toloyi, the Finance Manager as an alternate signatory to the Board's Bank Accounts with immediate effect.

It is the Claimant's position that after doing due diligence in his capacity as Chief Executive Officer he learnt that the instructions would be in conflict with the Financial Management Systems Manual which provided that the Finance manger is a mandatory signatory to a water services board account. The Claimant therefore added Ms. Maomi Jelimo as a signatory but also retained Mr. Toloyi as alternate signatory.

The Board appears to have been irked by the Claimant's failure to implement its resolution to the letter and on 22nd December 2016 issued the 2nd Respondent issued a Notice to Show Cause Letter to the Claimant in which he was required to respond to the charges as reproduced below-

- 1. You have failed to execute/implement Board resolutions and more specifically the resolution of 19/8/2016 vide MIN 11 on review of Account Signatories.*
- 2. Failed to communicate the resolution of 19/8/2016 to Ms. Naomi Jelimo, Manger Human Capital and Planning and Mr. Frederick Toliyi, Manager Finance.*

3. *You have not to date;*

a) Provided the Board of Directors with laptops to assist them in execution of their responsibilities; and

b) Prepared for induction/training of directors to enhance their competences.

The Show Cause letter further accuses the Claimant of *"blatant disobedience and insubordination hence a breach of rules and regulations governing your employment and justified under summary dismissal as per the current Human Resource Policy and Procedures Manual Clause 5.11 and in line with the provisions of the Employment Act, 2007."*

The Notice to Show Cause further states that

"Further during the retreat held at Lake Bogoria managers raised concern on mistrust, delegation, mismanagement, imprest process, fear/intimidation, communication, sabotage, National Cohesion and Integration/Tribal Groupings, approval and involvement of Board of Directors on external partnerships/engagements. It is clear that you are failing to lead your team of the Chief Executive Officer."

The Claimant was required to respond to the show cause letter within 7 days.

The Claimant responded to the show cause letter on 27th December 2016. He explained that he informed Naomi about change of signatory and she filled and signed the bank forms and submitted the required documents including passport photo. On failure to communicate to Naomi and Toloyi the Claimant explained that he did so and that informed their filling of the bank forms. On failure to submit to provide laptops the claimant responded that the issue of laptops had started before he was recruited, that most of the board members had joined the 1st Respondent on 14th June 2016 and that the laptops tender had been cancelled after the supplier delivered laptops that did not meet specifications necessitating fresh tendering and the laptops were to be delivered in January 2017.

On the charge that he failed to organise for induction/training directors the Claimant explained that trainings are arranged by State Corporations Committee(SCAC). He further pointed out that a meeting he had arranged for 18th and 19th October 2016 was put in abeyance by the Board in the meeting held on 7th October 2016 after a representative of SCAC assured the Board that trainings had been planned for November 2016 and January 2017.

On concerns arising from the Bogoria retreat between 27th and 30th November 2016 the Claimant explained that the forum was for sharing experiences and bonding between the Directors and senior staff and what was discussed weaknesses and areas of strengths for continuous improvement. He stated that he was therefore reluctant to respond to the unspecified claims as captured in the notice to show cause letter.

On 13th January 2017 the 2nd Respondent issued a letter of suspension to the Claimant. The charges in the letter of suspension are:

1. Failure to implement/execute and communicate board resolutions, specifically the resolution of 19/08/2016 vide MIN 11 on review of account signatories which is against Mwongozo guidelines, Employment Act and Human Resource Manual Clause 10.26.4.

2. During the retreat held in Lake Bogoria Resort managers raised the following issues touching on governance, internal controls and lack of proper leadership as the Chief Executive Officer which included mistrust, delegation, mismanagement, imprest process, fear/intimidation, communication, sabotage, National Cohesion and Integration/Tribal Groupings, lack of approval and involvement of Board of Directors on external partnerships/engagements.

The letter of suspension stated that the Claimant had failed to satisfactorily respond to the issues in his

verbal and written response.

The Claim herein is filed on 24th January 2017 together with a motion under certificate of urgency. He argues that he was suspended for failing to enforce an illegal resolution of the Board, for delays occasioned by his predecessor, without being accorded a chance to appeal against the decision and in a rushed and inconsiderate manner. In the Claim the Claimant prays for the lifting of his suspension and general damages for unlawful suspension.

In the application the Claimant prayed for a stay of the suspension, reinstatement, that the resolution of the 1st Respondents Board of 19th August 2016 on review of account signatories be declared void ab initio and the suspension of the claimant be lifted.

The Respondents filed a replying affidavit of Hon. Joseph Kipchumba Lagat, the 2nd Respondent sworn on 3rd February 2017 and Memorandum of Response to the Claim in which they deny the averments in the Claim and affidavits of the Claimant.

It is the Respondents' case that the claimant is guilty of the allegations levelled against him, that he failed to execute resolutions of the Board and that he came to court prematurely. The Respondents argue that the orders sought would result in the court usurping the mandate of the Board by engaging in internal management of the 1st Respondent.

The application and the Claim were consolidated and heard together. At the hearing of the case the Claimant and the 2nd Respondent who testified in support of their respective cases relied on their witness statements filed with their pleadings and then responded to questions put to them in cross examination and re-examination. The parties thereafter filed and exchanged written submissions.

Determination

I have considered the evidence submitted to court through the pleadings and the witness statement and viva voce evidence. The facts of the case are not in dispute. The only issues for the court to determine is whether the suspension of the Claimant is in compliance with the law and whether the Claimant is entitled to the remedies sought.

The Respondent has submitted in detail that courts should not involve itself with the internal disciplinary process of employers. The Respondents relied on the case of **Aviation and Allied Workers Union v Kenya Airways Limited; Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others; Geoffrey Mworio v Water Resources Management Authority & 2 Others; Nixon Bugo v The Alliance For Green Revolution in Africa; Gregory Otieno Owuoth v Mumias Sugar Co. Limited; and Professor Gitile Naituli v University Council Multimedia University College and Another** all of which confirm that Courts will not intervene in internal disciplinary process unless there are exceptional circumstances.

The question for determination is therefore if there are exceptional circumstances in this case warranting the court's intervention. To answer this question the court will look at the terms and conditions of service of the Claimant to confirm that the Respondents' action is compliant with the same.

Suspension is not provided for in the Employment Act. It therefore must be provided for in terms and conditions of service of an employee for it to be validly applied by an employer. In the present case the 1st Respondent's letter suspending the Claimant refers to LVNWSB Human Resource Policy Manual and PSC Human Resource Policy and Procedures, copies of which were not availed to court to confirm whether there are provisions for suspension therein. In the absence of such documents, which was the responsibility of the Respondents to produce to justify the validity of the suspension in terms of section 10 and 47(5) of the Employment Act, the court can only consider the suspension with reference to the Act.

To that extent the suspension is unlawful as there is no proof that the Claimant's terms of service provide

for the same.

Secondly, the 2nd Respondent admitted under cross examination that the 1st Respondent held a meeting on 26th January 2017 adopting resolutions of a special Board meeting held on 23rd January 2017 at which a decision was made to terminate the employment of the Claimant. The Claimant was not present at both meetings.

For termination to be valid there must be compliance with sections 41, 43 and 45 in terms of process and validity of reasons for the termination. In the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR**, Radido J summarised the legal fairness requirements set out in 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;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

In the present case the decision to terminate employment was made before the Claimant was given a hearing as specified in section 41. The letter of suspension expressly states that it was issued "*pending investigation of the matters*". This presupposes that the Claimant would be given an opportunity to respond to the charges arising following such investigations.

With respect to validity of reasons, the claimant responded to the charges in the show cause letter yet in the letter of suspension it is stated his response was not satisfactory. In the opinion of the Court the Claimant satisfactorily responded to the issue of implementation/execution and communication of the board resolution on review of account signatories by explaining that Ms. Naomi Jelimo, Manger Human Capital and Planning was added as signatory while Mr. Frederick Toloyi, Manager Finance was not replaced as the Claimant was complying with Water Service Board Financial Management System Manual which provides that the Finance Manager is a mandatory signatory. Instead the Respondents resorted to questioning if the Water Service Board Financial Management System Manual had been adopted by the Board, a matter that would not be in the Claimant's knowledge as he was not in employment on the date the manual would have been adopted. He explained that the management had been complying with the Finance Manual which was uploaded on its website as part of regulations governing operations of the 1st Respondent.

On the issue of the Bogoria resolutions the Claimant had explained that he was of opinion that they were unsubstantiated and in his opinion were areas of improvement and further that he was yet to receive the approved action items.

The 2nd Respondent further admitted that the predecessor of the Claimant resigned before the term of his contract expired, a matter that would point to the high handed manner in which the 2nd Respondent dealt with the Chief Executive Officer of the Board.

During the hearing 2nd Respondent admitted that the Financial Management System that the Claimant relied on is on the 1st Respondent's website as part of documents governing the operations of the Respondent. He further admitted that there were no trainings programs organised by Mwongozo for Board members of State Corporations in 2016 and the it was the function of Mwongozo to organise such trainings. He further admitted that laptops have been delivered after suspension of the Claimant. The 2nd Respondent did not respond to the Claimant's averments that he had not received the action items arising

from Bogoria retreat and therefore had nothing to act on in implementation thereof. It must further be taken into account that the retreat was held between 27th and 30th November 2016 and the show cause letter to the Claimant was issued on 22nd December 2016, just 3 weeks after the retreat with hardly any time for the Claimant to act on the vaguely framed issues raised in the show cause letter.

A critical look at the letter gives the impression that a decision had been made to terminate the contract of the Claimant and the Board was hunting for reasons to do so.

From the foregoing it is evident that there was no valid reason for suspension of the Claimant. The circumstances of the case give the court sufficient reason to intervene to prevent the unfair discipline and subsequent termination of the Claimant's contract and is in line with the decisions of this court cited by the Respondent.

Conclusion

Having found that the suspension was unlawful and that the circumstances leading to the suspension cannot pass the test of justice and equity, it is my finding that the Claimant has shown that the Respondents were proceeding in a manner that is in contravention of his rights to a fair hearing under the Constitution and the Employment Act, and further that the manner in which the Respondents have handled the Claimant's case is manifestly unfair and unjust.

For these reasons I declare the suspension unlawful and unconstitutional. I therefore lift the suspension and order the Respondents to immediately reinstate the Claimant back to work as the Chief Executive Officer of Lake Victoria North Water Services Board. The Respondents are further restrained from taking any further disciplinary action against the Claimant on the grounds contained in the Notice to show Cause letter dated 19th August 2016 and the Suspension letter dated 13th January 2017.

In view of the nature of orders made and the relationship between the Claimant and the Respondents, I order that each party shall bear its costs of this suit.

Orders accordingly.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE