



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

CAUSE NO.561 OF 2017

JAMES AMBUSO OMONDI.....CLAIMANT

VERSUS

MOHAMED MOULID SHURIE.....1ST RESPONDENT

WATER RESOURCES MANAGEMENT AUTHORITY....2ND RESPONDENT

RULING

1. The ruling hearing relates to application dated 21st March, 2017 and the Notice of Preliminary Objections dated 29th March, 2017 vide court directions on 3rd May, 2017.

2. The Claimant filed Notice of Motion dated 21st March, 2017 under the provisions of section 12(3) of the Employment and Labour Relations Court Act, Order 40 rule 1 and 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and Rules 28 and 32 of the Industrial Court Rules [Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

Pending hearing and determination of this claim, a temporary order be issued staying and/or suspending the respondent's interdiction letter dated 28th November 2016 addressed to the claimant.

A temporary injunction be issued restraining the Respondents from breaching the contract of employment dated 17th February, 2014 with the claimant, by subjecting he Claimant to inhuman, hostile and humiliating work environment pending the hearing and determination of this Memorandum of Claim.

Costs be awarded to the claimant.

4. The application is supported by the affidavit of the Claimant and on the grounds that he was employed by the 2nd Respondent on 1st July, 2011 and currently holds the position of Finance and Administrative manager at a gross monthly salary of Kshs.282, 200.00 together with other employment benefits.

5. On 31st July, 2016 the term of the then Chief Executive Officer (CEO) of 2nd Respondent ended and the 2nd Respondent had earlier on 8th April, 2016 advertised for interested applicants to tender applications for consideration. a total of 39 applicants submitted applications including 7 of who were current serving staff of the respondent. The Claimant was part of the 7 applicants.

6. Upon the conclusion of the interviews, 4 applicants passed the interviews and were submitted to the Cabinet Secretary for Water for appointment. The Claimant and the 1st Respondent were among the list of 4 names submitted and the 1st Respondent got the appointment as CEO and took over office from 1st August, 2016.

7. The Claimant was the 1st Respondent second in command in the 2nd Respondent and had expected that he would notify him on any intended changes to the running or management of the organisation upon assuming office. However upon taking office the CEO embarked on a sustained intimidation, harassment, frustrating and creating a non-conducive work environment.

8. Upon reporting on duty on 1st August, 2016 the 1st Respondent took drastic administrative duties;

He demanded two armed security for himself vide letter dated 1st August, 2016;

He declined to sign the handing over report alleging that it was incomplete despite the Chairman, outgoing CEO, the principal Secretary and other senior staff being present to witness the same;

Unilaterally allocated himself 3 vehicles with 2 drivers including the vehicle which has been assigned to the claimant.

9. On 2nd August, 2016 the CEO, 1st Respondent made more drastic changes;

He cancelled all staff transfers which had been implemented by the 2nd Respondent across the entire organisation and which had been approved by the human resource department and the 49th Board Committee and which left gaps left by retired staff and organisational realignment;

He cancelled staff upgrading, promotions and annual salary increments which had been approved and implemented by the 2nd Respondent and which impacted negatively on the staff;

He demanded to be the sole signatory of all the 2nd Respondent head office 52 bank accounts which request the Claimant declined since it was irregular and required board approval. The 1st Respondent demanded to be the mandatory signatory to the accounts but the Claimant informed him this required board approval and he accused the Claimant that this amounted to insubordination and thus directed the Chief Cashier to collect bank signatory changing forms for immediate implementation; and

Vide letter dated 2nd August, 2016 he deployed 9 support staff working with 2nd Respondent World bank Project implementation unit members without recourse to the human resource department.

10. On 3rd August, 2016 the 1st Respondent took further drastic steps by unilaterally taking over the role of human resource department to transfer junior staff and directed that an SMS be issued to recently recruited staff to report to head office and collect letters terminating their services but no letters were issued. The 1st Respondent continued to conduct himself as above the human resource and administration roles before he could be inducted.

11. On 7th August, 2016 the 1st Respondent took action against the Claimant and contrary to the law when he called for an urgent board meeting to be held on 11th August, 2016 where he informed the board he could not work with the Claimant which was unconstitutional. The board declined to sack the Claimant as there were no reasons to justify the same.

12. On 8th August, 2016 1st Respondent wrote a letter making allegations against the Claimant performance that KRA taxes had not been remitted; there were pending payment/bills; 100 million disbursements in July 2016; and that pending disbursements for the 15% WDC funds.

13. On 19th August, 2016 the 1st Respondent directed the Claimant to proceed on 50 days leave from 25th August, 2015 whereas such directive is not in the human resource manual and the Claimant had at the time taken 28 days of leave and the 1st Respondent had declined to approve. The 1st Respondent purported to fill a leave form for the Claimant which the Claimant declined to sign.

14. On 24th August, 2016 the 1st Respondent served the Claimant with a show cause letter raising several issues that the Claimant had;

Allowed WRMA to incur huge debts in terms of pending bills;

Prepared financial statements that did not show true view of 2nd Respondent liabilities;

Failure to advise board appropriately on financial status; failure to implement board resolutions on financial matters;

Withholding income tax and pensions contributions;

Failure to follow and implement some treasury circulars advising prudent financial management;

Non-disbursement for 15% WDC funds from WSTF; and

Financial misappropriation.

15. These allegations were false and malicious and meant to hound the Claimant out of office as the 1st Respondent was keen to remove him from office. The Claimant had been reporting to the board for 6 years and had no disciplinary case. When the Claimant declined to take the 50 days leave, on 6th September, 2016 the 1st Respondent stormed his office with fundis and closed his office and chased away his secretary and posted armed security to block claimant's access to his office. These events took place as the Claimant was holding a meeting with the chairman of the board; he was called by his secretary and was humiliated, embarrassed and felt degraded. The blocking of the office prevented the Claimant from undertaking his duties.

16. On 15th November, 2016 the 1st Respondent served the Claimant with another show cause letter alleging that the Claimant was absent from work without lawful authority when the Respondent had locked the claimant's office.

17. On 28th November, 2016 the Respondent served the Claimant with a letter of interdiction enclosing the audit report dated 23rd November, 2016 and directed to Respondent to various allegations. That of fraudulent payment of Kshs.96,647,787.00 to suppliers who never delivered services; unauthorised misallocation of Kshs.27,979,380.00 meant for drilling of 3 boreholes in Wajir County; making payment of kshs.10,570,470.00 without following required procurement process; and failure to pay statutory deductions and payroll deductions amounting to Kshs.1,746,45,500.00 as at 30th June, 2016 without the board knowledge and or approval.

18. The allegations made did not make reference to the claimant. The Claimant has been issued with various show cause notices and the issues keep on mutating every time. The Respondent is thus determined to terminate the claimant's employment.

19. Further grounds in support of the application are that the claimant's employment is based on renewable contract until he is 60 years and 1st Respondent mode of operation is to frustrate renewal of his contract due on 30th June, 2017. While in employment the Claimant has been subjected to humiliating and hostile work environment contrary to the law and constitution. Such is unfair and detrimental and done single headedly by the 1st Respondent contrary to the human recourse manual and the law.

19. The orders sought should be granted to allow restraining the Respondent from crippling the claimant's career.

20. In reply the Respondents filed a Replying Affidavit sworn by the 1st Respondent and who avers that the Claimant is an employee of the Respondent as Finance and Administration Manager pursuant to his terms of employment is required to adhere to human resources policy and Code of regulations. The Claimant is on contract running from 1st July, 2014 to 3rd June, 2017 subject to earlier determination of the contract of employment.

21. The Claimant has not satisfied the requirements for the grant of injunctions sought. The Claimant is on a fixed term contract with a salary clearly defined and any damages due to him can be computed and paid in the event the application is to succeed.

22. The Claimant was interdicted based on both internal investigations for misappropriation of fund and he is also facing investigations by the Ethics and Anti-Corruption Commission and has come to court to unclean hands.

23. The recruitment of the CEO by the 2nd Respondent was highly confidential and save for human resource personnel no other officers had authority to access such information or documents as are in the possession of the claimant. The Respondents will seek for the Claimant to disclose the sources of all the confidential information and documents and that such be expunged from the records.

24. The Claimant is bound under his contract to maintain confidentiality in all matters that come to his knowledge by virtue of his office and has no authority to disclose information or documents relating to the recruitment of the CEO.

25. Under the Water Act, the CEO is the principal officer of the 2nd Respondent and has responsibility over the day to day management of 2nd Respondent and was entitled to seek any information from the claimant. There is no second in command after the CEO as alleged.

26. The 1st Respondent did not make demand to have security but he made a request for approval by the board. At the handover ceremony the 1st Respondent could not sign the report as he needed to read the same and understand the contents especially the number of bank accounts; amounts in the accounts; petty cash amounts; and an indication was made that the 2nd Respondent was indebted to third parties in excess of Kshs500 million and the details were not disclosed.

27. The 1st Respondent did not unilaterally allocate himself 3 vehicles but such was done in accordance with his contract and guidelines of service and had not been aware the Claimant had been allocating done such vehicles.

28. From the handover report, the 1st Respondent was able to discern a very bleak picture of the 2nd Respondent financial status particularly that staff salaries were in arrears for one month; staff medical cover had been suspended due to non-payment of premiums; 20 members of staff had retired by 30th June, 2016 and a sum of Kshs.10 million was owing to them on account of final dues; a sum of Kshs.1.3 billion was reported owing to suppliers and contractors and various demand letters threatening legal action against 2nd respondent; there were rent arrears; deductions to various SACCOs and banks had not been emitted an interests were being imposed on affected members of staff due to no fault of their own; and where the transfers and promotions were to be effected a substantial amount of money would be incurred and such funds were not available.

29. Due to matters as noted above, it was a prudent management decision that all staff transfers and promotions be put on hold. Staff had made complaints about punitive transfers. To effect such matters would have put the 2nd Respondent into more debt. The World Bank project was delayed in implementation. The allegations that the 1st Respondent demanded to be sole bank signatory is not true

but had asked to be included as a signatory as the officer responsible for the organisation.

30. All board meetings were convened lawfully. The meetings were called to seek approval or various management issues and were appropriate.

31. The letter issued to the Claimant and dated 8th August, 2016 was well founded and based on findings of an audit undertaken by the authorised personnel. There was no vendetta against the Claimant as alleged. Audit questions had been raised as a result of claimant's failures to appropriately notify the board on the true and actual financial status of the organisation. There was no reason as to why the 1st Respondent would want to victimise the Claimant as they had no prior relationship before he joined the 2nd respondent.

32. The Respondents have not breached any rights due to the claimant. The permanent injunctions sought are premature; application has no merit and should be dismissed with costs.

33. The respondents' objections are based on the grounds that;

The substratum of this suit and application against the 1st Respondent is premised upon him being the chief executive officer of the 2nd respondent, water resources management authority, a government parastatal that can be sued in its own capacity.

The applicant documents used in his case supporting affidavit are confidential and are not admissible.

The plaintiff has no locus standi to institute the suit and application against the Respondents as there are procedures available to the Claimant within the 2nd respondent's human resource manual for resolution of employee grievances.

The suit and application violates mandatory provisions of the law.

34. Both parties filed written submissions.

The Claimant submits that he has made various allegations against the 1st Respondent and thus he is a right party herein. The behaviour and conduct of the 1st Respondent has been put into question and only fair that he be included as a party.

The production of documents alleged to be confidential is not a matter of law and cannot be addressed in a preliminary objection. The exhaustion of internal disciplinary mechanisms is also not a matter of law but a practice that can be challenged in proceedings such as these. The indefinite interdiction forced on the Claimant unless addressed by the court will remain indefinite and the Claimant has no room to undertake internal mechanisms since being locked out of office.

35. The Claimant also submits on the merits of his application by reiterating its contents.

36. The Respondents submits that the 1st Respondent as the CEO of 2nd Respondent is not a proper party herein as the 2nd Respondent has the capacity to be sued and to sue. The 1st Respondent is just an agent of the employer and thus should not be made a party herein as held in **James Muriithi Wathingira & another versus Stephen Muchiri Kariuki & 2 others [2009] eKLR**. The employment relationship is between the 2nd Respondent and the Claimant in exclusion of the 1st Respondent who should be removed from these proceedings.

37. The Claimant did not legitimately come across the documents elide upon in his affidavit and which documents are confidential in nature and he must have gone through 2nd Respondent files. Some documents relate to CEO appointment and other documents ordinarily within the human resource

department and being in possession of the same is in violation of the v=confidentiality clause of the claimant's contract.

38. The courts will not interfere with the employer's prerogative to perform internal human resource functions such as disciplinary control over employees. In **Aviation and Allied Workers Union versus Kenya Airways Limited [2012] eKLR** the court held that the courts are reluctant to be involved in a disciplinary process commenced by an employer unless in an appropriate case where it is established that the disciplinary process is commenced unfairly.

39. The orders sought in the claimant's application should not issue as he has no prima facie case and where any right is found as having been violated such can be compensated by way of damages. The application should be dismissed with costs.

Determination

Issues that emerge for consideration herein are;

Whether the objections made have merits; and

Whether the orders sought should issue.

40. Before delving into the issues set out by the parties, the Claimant has replied on the provisions of Rule 28 and 32 of the Industrial Court Rules. Such Rules have since been revised and on 5th August, 2016 new Rules, the Employment and Labour Relations Court (Procedure) Rules, 2016 were published. To thus rely on the revised rules is misleading as the provisions under rule 28 and 32 relates to matters which in my view are outside what the claimant's application is all about.

41. I will address the merits of the matters in the application.

42. Also, applications filed before the court must apply the Court Rules, Employment and Labour Relations Court (Procedure) Rules, 2016 and the Civil Procedure Act and the rules thereto apply before the High Court and only relates to this court proceedings where there is a particular issue/matter not specifically addressed. The primary document in terms of procedures is thus the Employment and Labour Relations Court (Procedure) Rules, 2016.

43. Leave due to an employee or direction to take leave by the employer is lawful. Section 28 of the Employment Act requires an employer to ensure that an employee takes leave that is due. Taking of such leave is not a disciplinary matter but a legal requirement on the employer to ensure that it is taken. See **Rajab Barasa & others versus Kenya Mean Commission, Cause No.2262 of 2016;**

Taking of annual leave is a legal requirement under the provisions of section 28 of the Employment Act. The employer is required to ensure that in every 12 months an employee takes their annual leave and this should not extend to beyond 18 months. The purpose is to ensure that each employee takes a paid break and the rationale is that rest cannot be postponed. To fail to give an employee a rest or break is to start eating on their energy which lead into burnout and reduction in productivity. Therefore, taking of annual leave is not punishment and in any case the duty is upon the employer to ensure each employee takes their annual leave when due. There is therefore nothing like 'forced leave' where an employee has earned such leave.

44. On the objections filed by the Respondents, it is apparent from the claimant's application that the matters set out revolve around the appointment, functions, role and decisions made by the 1st respondent. even where there is no employment relationship between the Claimant and 1st respondent, the role of the 1st Respondent cannot be separated and kept aside from proceedings herein as to remove he 1st respondent, matters touching n decisions and directions made would be left without him having the chance to address.

45. Section 12 (1) of the Employment and Labour Relations Court Ct grants this court jurisdiction over matters;

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –

46. *Employment and labour relations* are wide concepts which should not only be viewed from the narrow aspects of employer/employee. Such entails the work environment, interactions on the shop floor and all matters employment and the *relations* thereto. In **Wilbert Kipsang Choge & 6 others v Communications Authority of Kenya & another [2016] eKLR** and the findings that;

... Whereas the Employment Act defines what employment is, neither itself nor Labour Relations Act define labour relations. However, labour relations can be described as the interaction between employers and employees aimed at creating a fair working environment. It concerns laws, conventions, practices and institutions that regulate the working environment. To a worker or his representative, good labour relations mean conducive working environment, fair remuneration, staff welfare and freedom of association. To the employer good labour relations entails uninterrupted supply of contracted labour in order to achieve the organization's targets and objectives. To the employer staff must show dedication to work and commitment towards organizations goals and strategies.

47. I therefore find the 1st Respondent is a necessary party for the effective arbitration of matters herein. The presence of both Respondents will help the court effectually address all issues between the parties.

48. On the question of the Claimant producing documents found to be of a confidential nature to the Respondents, indeed, this court allow the employee to come before this court with their claim and no more. The duty is vested upon the employer to produce all work records and where need arises; a Claimant has the right to apply for production of documents as appropriate.

49. The rationale is that, an employer may lock out an employee for good reason. When such is done, an employee cannot force himself on the shop floor as to do so would amount to criminal conduct to which there is a sanction. Section 10(7) of the Employment Act therefore provides that;

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

50. Where an employee, under a confidentiality contract gets access to confidential records, which by their nature are not ordinarily in the custody of the employee and he proceeds to submit such records in court whereas the employee is in law not required to submit such records, questions must be asked as to how the employee was able to access such confidential records. The implication is that the employee acted in a manner that can only be described as criminal and contrary to section 44 (3) of the Employment Act. Such is a fundamental breach of the employment relationship and warrant summary dismissal.

51. From the supporting affidavit of the claimant, he avers that on 15th November, 2016 he was locked out of his office and would not able to access the same so as to undertake his duties. Where then did the Claimant get all the filed records in view of section 10(7) of the Employment Act provisions? The chronology of events and details of the same as set out in the affidavit and grounds in support of the claimant's Notice of Motion, though meant demonstrate the veracity of matters facing the claimant, to apply means that are otherwise unlawful to access documents and records of a confidential nature from the employer is to smirk on the face of fair labour relations. Such does not reflect positively on the person of the claimant. Fair labour relations cuts both ways. Parties must move in good faith.

52. The Respondent has however not outlined which documents and records are confidential. Save for

what is set out above, the record shall remain as filed.

53. Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases. Such is to enable an employer to address all disciplinary cases on the shop floor as the best place where primary evidence can be sourced. However, where an employee finds that the process initiated by an employer is unfair and that by application of such internal disciplinary mechanisms there was to be no justice, nothing stops such an employee from moving the court for urgent orders.

54. Whereas the court will ordinarily not interfere with the employer's prerogative to discipline its employees, internal proceedings found wanting in terms of being reasonable or done in good faith and in particular failed to adhere to fair procedure can be quashed and stopped so as to give an employee a fair chance. However each case must be interrogated on its own merit.

55. In this case, I find the Claimant has moved the court on good basis and his application should be addressed on its merits before being locked out of the court.

56. On the application and orders sought by the claimant, the gist of it is that his suspension should be stayed and letter dated 28th November, 2016 be lifted and that the Respondents be restrained from breaching the employment contract dated 17th February, 2014.

57. The letter dated 28th November, 2016 sent to the Claimant by the Respondent was an interdiction letter and required the Claimant *to show cause why you should not be summarily dismissed from employment for occasioning loss and fraud*. The allegations made against the Claimant are outlined therein with regard to;

- (i) fraudulent payment of Kshs.96,647,787.00 to suppliers who never delivered services;
- (ii) unauthorised misallocation of Kshs.27,979,380.00 meant for drilling of 3 boreholes in Wajir County;
- (iii) making payment of kshs.10,570,470.00 without following required procurement process; and
- (iv) failure to pay statutory deductions and payroll deductions amounting to Kshs.1,746,45,500.00 as at 30th June, 2016 without the board knowledge and or approval.

58. The notice is thus clear and the allegations made clearly set out. At paragraph 23 and 24 of the Claimant's Supporting Affidavit, he does not indicate as to whether he relied to this letter of 28th November, 2016 as required of him. The defence made is that the allegations made are not true and that the alleged audit report did not make reference to him.

59. To the contrary, the Claimant was interdicted are required to address serious matters with regard to his employment matters which required him to show cause as to why he should not be summarily dismissed.

60. An employer has the prerogative to discipline its employees. An interdiction or a suspension like in this case is only interim to allow for investigations. However an Interdiction can form part of a preliminary step in the disciplinary process. The Claimant as the employee may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in the regulations of the 2nd respondent. To keep out of the shop floor and stall the disciplinary process would only injury the employment relationship as held in **Samson Omworo versus Maasai Mara University 7 others, Cause No.2367 of 2016**.

61. The Claimant has not replied to the issues he was directed to show cause on. Such are serious matters on he can address. Such is best addressed by the Respondent on the shop floor as the best place the parties

can source for the best primary evidence.

62. To seek to injunct the Respondents from carrying out its mandate at the work place with regard to addressing disciplinary matters yet the Claimant has failed to abide the process commenced in this regard is to negate the principle of fair labour relations. Where the Claimant is heard and found innocent, his case will be dealt and where the investigations are complete and a sanction found appropriate, nothing stops the Claimant from moving the court as appropriate.

63. However, in the instant case, the orders sought shall not issue.

64. I have looked at the Memorandum of Claim filed together with the Notice of Motion. With the analysis above, the other orders/prayers sought is that the Claimant be compensated of loss of employment. Such loss has not occurred. The Claimant in his affidavit avers that he was on a term contract. A claim for compensation for the remainder period of the contract term up to 60 years would therefore not find basis. The claim for discrimination against the Claimant and the facts of the case where he has been issued with an interdiction letter and show cause dated 28th November, 2016 and he has not replied thereto negates the same.

65. As such, to sustain the suit in its current form would be just academic.

Accordingly, the objection of 29th March, 2017 addressed as above, the application dated 21st March, 2017 is hereby dismissed. Each party shall bear own costs.

Delivered in open court at Nairobi this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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