



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2300 OF 2010

PAUL WANYANGAH CLAIMANT

VERSUS

MARKET DEVELOPMENT TRUST T/A

KENYA MARKETS TRUST RESPONDENT

JUDGEMENT

Issues in dispute – wrongful termination of employment and refusal to pay damages for wrongful termination of employment.

1. The claimant was employed by the respondent via contract of service for a period of 2 years commencing 2nd February, 2015 at a gross monthly salary of kshs.1,080,000.00. on 2nd August, 2015 the employment contract was revised to be a 3 years contract with effect from 13th October, 2015 at a gross monthly salary of Kshs.1, 350,000.00. From January, 2016 the claimant was effectively earning Kshs.1, 472,285.00 per month.

2. On 19th July, 2016 and while the claimant was abroad on a study programme, the respondent board of directors held a meeting and one item that was discussed was a report prepared and issued by KPMG Kenya, a consulting firm upon the request of United Kingdom Department of International Development (DFID) the main donor of the respondent. The report related to an audit of the respondent for the period of January, 2014 to March, 2016.

3. The claimant protested to DFID and the respondent on its report on the grounds that the report did not have an input by management and the claimant. The claimant a part of respondent's management was denied access to the meeting through Skype.

4. On the 26th July, 2016 the claimant returned from abroad when he was called by the chairman of the respondent, Dr Julius Caesar Mwangi (Dr Mwangi) for a meeting at Serena Hotel. At the meeting, Dr Mwangi asked the claimant to resign from his employment with the respondent on the basis that the of the KPMG findings. The claimant protested against this demand on the grounds that he had not seen the alleged report.

5. On 29th July, 2016 the respondent sent the claimant on compulsory leave for two (2) weeks pending investigations on the KPMG report and its findings. On 3rd August, 2016 through an email, Dr Mwangi offered the claimant 4 months' pay as an amicable settlement to the matter and in return he was to tender his resignation. On 1st August, 2016 during a meeting held in the respondent's offices between the claimant and Dr Mwangi, the claimant was asked to resign on the basis of the KPMG report and the

claimant asserted that he should be paid for the remainder of his contract term a period of 27 months as he had not done no wrong to justify his resignation.

6. On 5th August, 2016 Dr Mwangi sent the claimant an email with an offer for 4 months pay for his resignation and that unless the offer was accepted; the respondent would commence termination proceedings. On 12th August, 2016 the respondent wrote to the claimant requiring him to attend a disciplinary meeting on 22nd August, 2016 based on 4 allegations drawn from the KPMG report and one other charge. The claimant replied and requested for documents in support of charges against him and that the disciplinary meeting should only be called if the respondent was not satisfied with his response. The respondent failed to provide all the requested documents. The claimant was not able to respond to the charges against him.

7. On 12th October, 2016 the claimant wrote to the respondent indicating his inability to reply to allegations against him and noted that the KPMG report could not be used against him as it was a confidential report meant for DFID who had commissioned it and the respondent could not rely on it. The report is not a forensic or legal audit and cannot be used as a basis of charging anybody. The report did not include management views or the claimant's views. The claimant could also not be able to respond to allegations against him on the grounds that the respondent had failed to supply him with crucial documents. These included the financial policy and procurement document; the criteria used by the auditor in reaching the conclusion that there was a high usage or high maintenance of vehicles by the claimant; documents of alleged payments to KRA; and statements from employees who had made allegedly made complaints against him.

8. The claim is also that the respondent had already prejudged the claimant and was biased against him and thus there would be no fair hearing. A finding had already been arrived at that the claimant was not contributing to the organisations development and the board had no confidence in his continued ability to serve as the chief executive officer.

9. In reply to the claimant, on 19th October, 2016 Dr Mwangi invited the claimant to a disciplinary meeting on Monday 24th October, 2016 a Dusit hotel, Nairobi. Together with the letter, there was a mail message from Dr Mwangi and Ms Nyokabi Njuguna, a board member of the respondent. The email message indicated that the disciplinary hearing would be on Tuesday 25th October, 2016 but the venue was not stated.

10. The claim is that on 24th October, 2016 the claimant attended the disciplinary hearing venue as directed but was informed that there was no scheduled meeting of the respondent at the hotel. The claimant went to the respondent offices to enquire if there was a meeting but the security officer at the door informed him there was no meeting scheduled for the day.

11. The claim is also that on 25th October, 2016 the claimant was confused, frustrated and desperate that he did not attempt to verify whether the disciplinary meeting was on this day. Following two conflicting notices and different dates for the disciplinary meetings he felt this was a ploy by the respondent to confuse him so as to deny him a fair hearing.

12. On 31st October, 2016 the claimant received a letter dated 25th October, 2016 that he had been terminated from his employment with the respondent. This was in violation of the law as there was no notice, due process and he was not paid terminal dues or the salary due for October, 2016.

The claim is for;

a) Salary for the month of October 2016 at kshs.1,472,285.00

b) Salary for 24 months the remainder of the contract period at kshs.35,334,840.00

c) Pension employer contribution for 24 months the remainder of the contract period at 10% of gross salary at kshs.3,533,484.00

Total Kshs.38, 686,324.00.

13. The claimant is also seeking for a declaration that the termination of his employment as unlawful; he should be reinstated to his employment; and in the alternative he should be paid the claim of Kshs.38, 868,324.00 for unlawful termination with interests and costs.

14. The claimant testified in support of his claim.

Defence

15. In defence, the respondent admits that the claimant was employed by the respondent and had a written contract with terms and conditions of employment.

16. In June, 2016 the DFID a main funder of the respondent commissioned KPMG to conduct an audit on the respondent's procedures during the period of January, 2014 and 30th march, 2016. Following the audit, KPMG made a presentation to the respondent's board at a special meeting on 19th July, 2016. At the time the claimant was abroad and he was not required to be at the meeting. The report addressed fundamental issues relating to procedures at the respondent and he board was able to discuss it at length. The report raised specific issues and concerns in relation to procurement and fee arrangements with specific consultants and also noted several weaknesses in the purchase and use of programme assets and the claimant's leadership in relation to employment issues. That the claimant bullied and abused staff resulting in severe staff demotivation. The board was concerned with these findings and thus requested for further investigations on the issues raised.

17. Following this meeting Dr Mwangi as the board chairperson met the claimant to inform him of the adverse finding on the report and the fact that the board was considering taking steps on the report. The claimant was not asked to resign as alleged but following the meeting it was common cause that the respondent board would take action against him or the matter would be settled with the claimant resigning from his position.

18. The defence is also that in accordance with the policy, the board resolved to place the claimant on compulsory leave with full pay for 2 week effective 1st August, 2016 so as to facilitate investigation. This was to ensure that the claimant did not interfere with investigations and letter dated 29th July, 2016 was issued to the claimant to this effect.

19. Dr Mwangi as chairperson of the respondent board engaged the claimant in discussions on a without prejudice basis and in an effort for an amicable resolution to the underlying issue. This was at a meeting held on 27th July, 2016 at Serena Hotel; meeting held on 1st August, 2016 at Dr Mwangi's office; and emails set to the claimant in this regard were thus on a without prejudice basis.

20. In the further investigations commenced by the board following the findings of KPMG audit, it emerged that;

- a) The claimant in his role as CEO of the respondent had failed to take into consideration value for money in procurement;
- b) There was weakness in ensuring control of the use of programme funds;
- c) Programme funds were used to meet the costs of imports and customs duties contrary to the MOU with DFID; and
- d) The claimant constantly interfered with and micromanaged the staff.

21. The board resolved to invite the claimant for a discussion on the issues made against him and following investigations vide letter dated 12th August, 2016 for a meeting on 22nd August, 2016. On 17th August, 2016 the respondent made effort to contact the claimant to deliver its letter of 12th August, 2016 and the claimant directed this be delivered to his house and the driver Mr Eric Mbatha was sent there but upon arrival the occupants of the house refused to accept the documents. On 15th August, 2016 the respondent made arrangements with DHL to deliver a parcel to the claimant but he declined service and via phone called with instructions that he would pick the parcel at the Village Market but failed to do so and claimed to be out of town.

22. On 19th August, 2016 the claimant called Dr Mwangi seeking to be provided with additional document, to be granted access to his office and emails. On 22nd August, 2016 Dr Mwangi allowed the claimant access for him to be able to respond to allegations against him by 24th August, 2016 and a meeting with the claimant was rescheduled to 26th August, 2016.

23. On 23rd August, 2016 the claimant replied to Dr Mwangi and demanded unrestricted access to the office and emails and asked for additional documents and the claimant also confirmed to have received various documents from the respondent. he requested for time to study these records which were delivered to him. The respondent thus complied with each request made by the claimant with regard to access to the office and email and provision of all required documents.

24. The respondent board went out of its way to ensure compliance with the human resource policy. The board was also conscious of the fact that the continued delay in the matter would make the respondent operate without a CEO for over 3 months yet a salary was being paid to the claimant for the period.

25. In view of the claimant failing to respond to allegations made against him, the respondent board decide to convene on 25th October, 2016 at Dusit Hotel, the claimant was invited vide letter of 19th October, 2016 and sent via email from Dr Mwangi and another by a Ms Nyokabi Njuguna. In the letter of 19th October, 2016 the respondent inadvertently stated the hearing was on 24th instead of 25th October, 2016 which was then corrected by Ms Nyokabi and Dr Mwangi.

26. claimant deliberately failed to attend at the hearing for ulterior motives.

27. Given such failure by the claimant to present himself at the hearing with the respondent board, all allegations were considered and the claimant found culpable. A decision was taken to terminate the employment of the claimant in accordance with the respondent policy and cause 10.1.1 of the employment contract. The claimant was notified to collect his terminal dues to be paid upon his clearance and handover. While the claimant returned most of the respondent property several items are still outstanding being the medical cards and a Transcend 500GB. The claimant has also not submitted a handover report or participated in an exit interview.

28. The claimant is not entitled to the reliefs sought and the claim should be dismissed.

29. In evidence, the respondent witnesses were Dr Mwangi and George Mbithi, the Board chairperson and Communications Manager of the respondent respectively.

30. At the close of the hearing both parties filed written submission.

Determination

In the analysis of the matter before court I have put into account the detailed pleadings, the evidence of both parties and the written submissions.

31. Section 43 of the Employment Act requires an employer to prove the reasons for a termination; section 45(2) of the Act requires it to prove that the reasons for termination are valid and fair reasons

while section 45(4) of the Act requires an employer to act in accordance with justice and equity in terminating an employee; section 47(5) of the Act obliges an employer to justify the grounds for terminating an employee. These four sections deal with substantive fairness of a termination of employment.

32. Section 47(5) of the Employment Act, 2007 go beyond substance and procedure and provides that the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer. The law provides as follows;

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.

33. Both parties have gone to great lengths to demonstrate matters taking place within the respondent from the time the claimant was sent on leave to allow for investigations on 29th July, 2016.

34. Following an audit of the respondent undertaken by KMPG commissioned by a main funder the DFID, matters of concern arose that required the respondent to address. The respondent conducted further investigations and found claimant culpable and required him to respond to the allegations made against him based on the KPMG report and following the further investigations. The claimant was thus directed to take leave.

35. As matters were unfolding, Dr Mwangi being the chairperson of the respondent board and a close friend of the claimant and concerned with the turn of events called him for a meeting and advised him to address matters against him seriously of to tender his resignation. There seems to have been negotiations where the claimant demanded to be paid for 4 months so as to resign from his position. There was no agreement on this front of a settlement. Such negotiations were abandoned as they bore no fruits.

36. Without any settlement, parties went back to the initial show cause where the claimant was required to respond to the allegations against him. Such I find resolved the offer made to him as this was not accepted.

37. Subsequently, the claimant was issued with show cause and required to attend. Upon being sent on leave on 29th July, 2016, the following ensued;

On 12th August, on 22nd August, 2016 the claimant was invited to attend disciplinary meeting 2016;

The claimant requested to submit his response in writing and this was accepted and to be done by 24th August, 2016;

On 19th August, 2016 The Claimant Requested For Documents From The Respondent To Be Able To Reply To Allegations Against Him;

On 23rd And 24th August, 2016 The Claimant Asked For More Documents;

On 24th August, 2016 Dr. Mwangi Replied And Asked The Claimant To Set Out Which Documents He Required Further To What Had Been Issued To Him;

On 25th August, 2016 Dr Mwangi Confirmed To The Claimant All Shared documents and offered to accompany the claimant to the office to access more documents on 26th August, 2016 to which the claimant declined;

On 19th October, 2016 the claimant was invited to the disciplinary hearing to be held on 24th

October, 2016;

Another email was sent indicating hearing would be on 25th October, 2016;

The claimant attended on 24th October and found there was no meeting and decided to ignore the notice for 25th October, 2016; and

On 25th October, 2016 the board met and made a decision to terminate the employment of the claimant.

38. An employee sent on leave or placed on suspension or interdicted by the employer to allow for investigations for any alleged misconduct remains an employee of such an employer until his employment is terminated. Such an employee while on leave or as directed is subject to instructions and directions of the employer. Such leave or allowed absence from work does not in itself allow the employee to do that which is at his convenience.

39. The rationale is that the employer is at liberty to recall such an employee back to the shop floor to facilitate investigations, further information and take directions as required. An employee thus sent on leave to allow for investigations cannot refuse to attend at work on the same reason that they feel frustrated or are simply not feeling like it. Such is tantamount to insubordination as the leave taken is for the single purpose to allow for investigations.

40. The offer by the respondent to have the claimant attend at the office on 26th August, 2016 to be able to access all records, documents and email as he required so as to be able to respond to allegations against him and thus move the process forward is a matter I find to be reasonable and generous of the respondent. This was the best chance the claimant had to be back at his office and ensure that all information required was addressed and attended to. However, by letter of 23rd August, 2016 the claimant declined and made conditions to have unrestricted access.

41. Prior to this date, the respondent had made efforts to deliver documents to the claimant's residence and he declined such service. DHL was sent to his residence but the claimant called and requested to collect the parcel from the DHL office but he failed to attend.

42. The claimant, as the CEO of the respondent, at his senior position, I take it he had access to most of the documents he had been requesting from August to October, 2016. Where such documents were not in his possession, accessible from his computer, phone or on emails, he had the chance to go to the office and get all such records and documents in one place. He declined to attend and made his attendance at the office conditional.

43. In these circumstances, I find the respondent and Dr Mwangi for the board felt exasperated to take a decision. Efforts to ensure procedural justice to the claimant had failed.

44. In **Jackson Butiya versus Eastern Produce Limited Cause No.335 of 2011** the court held that an employee who squanders the internal grievance handling mechanisms provided by an employer cannot turn round and say he was denied a right to be heard. This position is reiterated by the court in the case of **David Njeka versus Lavage Dry Cleaners [2013] eKLR** and where the court held that where an employee, granted the chance to make a submissions fails to do so, he cannot be heard to say that he was not given an opportunity to defend himself.

45. Of great concern in this case is the attitude and approach taken by the claimant towards his employer and the requirement that he addresses allegations against him so as to have the matter addressed at the earliest noting the position he held with the respondent. I also take mention to the efforts taken by the respondent chairperson to address the matters herein to the best of his abilities taking into account the position held by the claimant and going out of his way to protect the integrity of the systems within the respondent and accord he claimant the chance to state his case.

46. The above is apparent from the events of 24th October, 2016.

47. On 24th October, 2016 the claimant went to Dusit Hotel and found out there was no meeting of the respondent booked at this venue. He went to the respondent's office and he made enquiries from the security officer at the door whether there was a meeting planned for the day or for the 25th October, 2016. At this point when the claimant established there was no meeting at Dusit hotel on 24th October, 2016 nothing stopped him from calling, sending a message, email or otherwise to the respondent for clarification. To seek information from the security officer at the door is not responsible of an officer of the claimant's standing who was well aware that such a security officer at the door may not have had the benefit of meetings details with board members. The meeting notices had been sent via emails and it was obvious the claimant was in constant communication with Dr Mwangi as the respondent chairperson. There is no rationale as to why the claimant took the option to walk away following the details he obtained from the security officer whom he has not attached a name. The claimant is so detailed and thorough in his analysis of matters facing him from his travels in July, 2016 to the date of his termination from employment. With such details, the omissions to address matters facing him must be brought to account.

48. By failing to respond to allegations made against him, despite being issued with required documents and where such were not sufficient on 26th August, 2016 the claimant was allowed access to his office and emails, I find the claimant squandered his chance and right to a hearing.

49. For the claimant to be away from the office from 29th July, 2016 was upon invitation by the employer. The requirement to reply and to attend at the disciplinary hearing was time for the employer. Such time was paid for by the respondent. The claimant cannot thus be heard to say that when he failed to find a meeting on 24th October, 2016 he decided to drive away and go to the country side. Such time was paid for. Such time to drive away was at the expense of the employer. To seek to prolong the disciplinary process was a matter the claimant did with relish. Such cannot be allowed in fair labour relations.

50. Section 41 of the Employment Act, 2007 must be read together with section 45(5) of the Act which provides as follows;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) The conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

51. Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.

52. To have allowed the claimant his demands as made from the point when he was sent on leave on 29th July, 2016 and up until the 26th August, 2016 when he declined to attend the his office, such was reasonable. Moving forward, the demands made onwards I find were irrational and only meant to hold the respondent at ransom. See **Jennifer Osodo versus Teachers Service Commission [2013] eKLR** where

the court held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.

53. The above aptly captures events with the claimant. I cannot add more save that the failure by the claimant to address allegations made against him despite being given sufficient time and chance to be heard; he cannot claim the action taken against him was unfair. The claim that there was unfair termination of employment cannot stand. The respondent is justified in law in effecting the termination of the claimant. Such cannot be faulted in terms of procedure of the substantive reasons appurtenant thereto.

54. On the claims made, the claimant cannot be reinstated on the basis and finding of the court that termination of employment was fair. The claim for salaries due for the remainder of the contract period do not arise on the reason that once the termination of employment was justified, the term contract ended with such closure.

55. The pension due with regard to the employer contributions is conditional. The rules governing such access to the pension are regulated and once the employment terminated at the instance of the respondent due to the conduct of the claimant, the employer contribution does not arise.

Accordingly, the claim is hereby dismissed save where the salaries due for the 25 days for October, 2016 shall be paid. Such dues shall be paid less the property worth and what the claimant has failed to clear. Each party shall bear own costs.

Dated and delivered in open court at Nairobi this 10th day of August, 2017.

M. MBARU JUDGE

in the presence of:

Court Assistant: David Muturi

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