



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 72 OF 2012**  
**ANDREW OLOO OTIENO.....CLAIMANT**  
*VERSUS*  
**KENYA SUGAR BOARD.....RESPONDENT**

Mr. Fred Athuok for claimant

Mr. Rono for respondents

**JUDGMENT**

1. The claimant was serving a second term of three (3) years commencing 1<sup>st</sup> July 2006 in the position of Chief Executive Officer. The terms and conditions of service are contained in the written contract of employment produced before court.
2. On or about 6<sup>th</sup> November 2007, the claimant was suspended from duty. The claimant remained under suspension for a period of one year until December 2008.
3. The claimant wrote several letters seeking explanation for the suspension which letters were not answered. In terms of the contract and as admitted by the respondent, the claimant was entitled to payment of medical cover and house allowance during the period of suspension. A sum of Kshs.720,000/= comprising housing allowance for 12 months calculated at Kshs.60,000/= per month is admitted. The issue as to whether salary was payable during the period is in dispute.
4. The claimant was summarily dismissed on 28<sup>th</sup> November 2008. By the statement of claim filed on 20<sup>th</sup> January 2012, the claimant alleges;
  - a. The suspension was in blatant disregard of the set out procedures in the guideline on procedure for removal of Chief Executives and replacement of Board of Directors in state corporations issued by the Head of Civil Service.
  - b. The dismissal was without any probable and or reasonable cause and was contrary to the provisions of the Employment Act, 2007.
  - c. That the claimant suffered immense loss and damage because being a Chemical Engineer, it would be impossible to get an alternative employment due to tarnished reputation.

5. The claimant prays for;

(i) Special damages in the sum of Kshs.26,230,775/= comprising of;

- a. Salary arrears for the period 7<sup>th</sup> July 2007 to June 2008 (8 months) at Kshs.286,000/= per month in the sum of Kshs.2,228,000/=.
- b. Salary arrears for the period 8<sup>th</sup> July 2008 to 9<sup>th</sup> June 2009 at Kshs.314,600/= per month for 12 months in the sum of Kshs.1,000,000/=.
- c. House allowance for the period 7<sup>th</sup> July to June 2008 at Kshs.60,000/= for 8 months in the sum of Kshs.480,000/=.
- d. House allowance for the period 8<sup>th</sup> July 2008 to 9<sup>th</sup> June 2009 in the sum of Kshs.720,000/=
- e. Other unpaid allowance during the same period 7<sup>th</sup> July 2007 to 8<sup>th</sup> June 2008 in the sum of Kshs.1,000,000/=.
- f. Payment in lieu of leave days not taken for July 2003 to June 2009 in the sum on Kshs.1,731,333/= including leave travelling allowance of Kshs.198,000/=.
- g. Balance gratuity in the sum of Kshs.7,520,964/=.

## **Response**

6. The claim is opposed vide a statement of response filed on 21<sup>st</sup> February 2012. The nub of the defence is as follows;

- a. Following a request for advice from the parent ministry on whether to negotiate a matter that was already in court (Genetic Technologies International case), the Permanent Secretary for the Ministry of Agriculture directed the respondent, through the claimant to cease any negotiation.
- b. Despite the clear directive from the parent ministry, the claimant misled the Board of the respondent into believing that no response had been received.
- c. Based on this misrepresentation, the respondent passed a resolution authorizing payment of sums amounting to over Kshs.142 million.
- d. Further in 2008, the EACC began an inquiry into allegations of misuse of office by the claimant. The EACC in their inquiry found that due to the tardiness of the claimant, the firm of Rachier and Amollo taxed their bill without any representation of the respondent under the watch of the claimant.
- e. The taxation led to attachment of the respondent's assets and the respondent was forced to spend over Kenya shillings one million as auctioneer's fees to salvage the respondent's assets.
- f. The claimant was thus suspended to pave way for investigations in line with the state Corporations Act and the Public Service Commission Regulations.
- g. Through a show cause letter dated 22<sup>nd</sup> October, the claimant was invited to explain why he should not be summarily dismissed.
- h. The claimant failed to respond to the letter within the set timelines and an additional 23 days was given. No response was received.

i. The Board consequently proceeded to exercise its powers under Section 10 of the Sugar Act and summarily dismissed the claimant.

7. The respondent concludes that the summary dismissal of the claimant was lawful and fair and the claim should be dismissed with costs.

8. With regard to the claim for payment of special damages the respondent states as follows;

a. With regard to payment of salary during the period when the claimant was in suspension the respondent relies on paragraph 15.5 of respondent's Human Resource Policy and Procedure manual which provides

**“where a member of staff is suspended from the exercise of the functions for investigations ----- He shall not be entitled to any salary”**

That the claimant was in suspension for investigations from 2007 to November 2008 and is not entitled to any salary during the period.

The respondent conceded that the claimant was entitled to house allowance of Kshs.720,000/= during the period. However, the claimant claims a further sum of Kshs.480,000/=.

b. The respondent denies all the other claims set out in the statement of claim. That the claimant took leave through out the contract period and is not entitled to payment in lieu thereof. Further more in terms of the employment contract, claimant was entitled to 30 working days leave per calendar year and that leave was not to be carried forward except with written approval of the board setting out the reason for extension. That any leave not taken during the leave year was to be forfeited unless authority to carry forward has been granted in writing by the board.

9. That no such leave extension was granted to the claimant in writing. It follows that leave allowance for any leave forfeited is not payable also.

10. With regard to gratuity, the respondent states that the claimant was paid gratuity on completion of the first three years' contract which ended in 2006 a sum of Kshs.195,848.45/=.

11. That the claimant was not entitled to gratuity in respect of the second contract, because he did not complete to serve the contract and the same was terminated for misconduct.

12. That the claim for special, general damages and interest be dismissed with costs.

### **Determination**

13. The issues for determination are as follows;

(a) Whether the employment contract was terminated for a valid reason and in terms of a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

### **Issue i**

14. A careful analysis of the testimony under oath by the claimant and that by RW1 , Peter Lukoye who testified on behalf of the respondent and having considered the written submissions by both parties, the court has come to the following conclusions of fact and law;

15. The summary dismissal of the claimant by the respondent was for a valid reason in that the claimant refused and/or neglected to follow a clear directive from the Parent Ministry to cease negotiating out of

court settlement. Based on the omission by the claimant, the respondent passed a resolution authorizing payment of sums amounting to over Kshs.142 million to the loss and detriment of the respondent.

16. Further, the respondent failed to defend a taxation of a bill by Rachier and Amollo advocate due to negligence by the claimant.

17. Furthermore, the taxation led to attachment of respondent's assets and the respondent was forced to spend over Kenya shillings one million as auctioneer's fees.

18. The claimant was given a show cause letter to explain why he should not be summarily dismissed for gross misconduct. The claimant failed to respond to the show cause letter. He was given additional 23 days to respond but failed to do so.

19. The claimant was therefore afforded opportunity to defend himself but failed to do so.

20. In **Selvarajan –vs– Race Relations Board [1976] 1 ALL ER 12 at 19** Lord Denning held that;

*“in all these cases, it has been held that the investigating body is under a duty to act fairly; but that which fairness require depends on the nature of the investigation and the consequence which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing; it can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given; it need not name its informants. It can give substance only.”*

21. Be that as it may, the statutory position under Section 41 of the Employment Act, is that, the employee should be given opportunity to explain in a disciplinary hearing the case he faces if the written answer to the notice to show cause is deemed to be on the point but not satisfactory. A completely irrelevant explanation or a no response at all does not warrant an oral hearing thereafter. In addition, it is required under Section 41 that the employee, be accompanied by an employee of choice or a union official in case of unionisable employees.

22. In the present case, the claimant having failed to respond to the notice to show cause was not entitled to be called to a disciplinary hearing.

23. The summary dismissal was substantively and procedurally fair and the claimant is not entitled to general damages in respect thereof.

## **Issue ii**

24. Concerning the special damages claimed by the claimant, the court finds as follows;

a. The claimant is entitled to payment of house allowance during the period of suspension from November 2007 till November 2008, date of dismissal in the sum of Kshs.720,000/=. The additional payment has not been adequately proved, the court having noted the suspension was in November 2007 and the summary dismissal was in November 2008.

b. Regulation G.32 (3) of the revised code of Regulation provided for payment of house allowance and medical allowance during the period of suspension.

## **Salary Arrears**

25. Regulation 15.4 titled interdiction defines interdiction to mean

**“stopping an employee from carrying out the functions of his/her office pending investigations while earning not less than one half (½) of his basic salary.”** What happened to the claimant though dubbed, suspension also amounted to an interdiction because the proceedings could lead and actually led to his dismissal. It is the court’s considered view that the claimant ought to have received ½ of the basic salary during the period of suspension/interdiction from November 2007 to November 2008 in the sum of Kshs.1,887,600/= (314,600 x 12 x ½).

### **Gratuity**

26. With regard to claim for gratuity, the contract of employment provided that,

**“upon successful completion of each contract term you will qualify for an on-off gratuity calculated at a rate of 31% of your annual basic salary. This gratuity is taxable;”**

27. Having found that the claimant did not successfully complete his contract and that the claimant was summarily dismissed for misconduct, the claim for gratuity is untenable and the same is dismissed. The court however, notes that it is prudent and conscionable to pay prorata gratuity for the completed term of the contract.

28. The sins that happen afterwards should not negative the proceeds from the contract that had accrued before the employee committed gross misconduct. This position ought to be considered in future public service contracts and regulations.

29. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows;

(a) Kshs.720,000/= house allowance for the period November 2007 to November 2008.

(b) Kshs.1,887,600/= arrear half salary for the period November 2007 to November 2008.

**Total Kshs.2,607,600/=**

(c) The award is payable with interest at court rates from date of filing suit till payment in full.

(d) Costs to follow the outcome.

**Dated and Delivered at Nairobi this 8<sup>th</sup> day of September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**