



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 145 OF 2015

LUCY WANGARI KARIUKI.....CLAIMANT

VERSUS

KANGUNU FARMERS CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 4th November, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 01.09.2015 through Boniface M. Kavuvi, General Secretary, Kenya Union of Commercial Food and Allied Workers. The claimant prayed for judgment against the respondent for nullification of the dismissal for want of legal compliance and immediate reinstatement of the claimant back to employment without any loss of benefits and seniority within the meaning of section 49 of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011. In alternative the claimant prayed for:

- a) Payment in lieu of notice Kshs. 98, 145.75 as per clause 3 of the collective agreement.
- b) Unpaid leave travel allowances for 38 days of leave at 15 days' basic pay Kshs.16, 357.60.
- c) Service gratuity per clause 4 of the collective agreement Kshs. 1, 472, 186.25.
- d) Maximum compensation for unfair termination Kshs. 451, 470.00
- e) Total prayer for Kshs. 2, 038, 159.60.
- f) Any other form of compensation and relief the Honourable Court may deem fit to meet ends of justice.
- g) Costs of the suit.

The memorandum of response was filed on 08.10.2015 through C.M. King'ori & Company Advocates. The respondent prayed that the claimant's suit be dismissed and by way of counterclaim for judgment against the claimant for:

- a) A declaration that the subject employment contract between the claimant and the respondent was void *ab initio*, fraudulently procured and unenforceable against the respondent.
- b) An order that the claimant do retribute to the respondent the financial loss as pleaded in

paragraph 12 hereof.

c) Costs of the claim and the counter-claim.

The reply to the response and counterclaim was filed on 11.12.2015.

The claimant was employed by the respondent as an assistant recorder with effect from 01.10.1999. She was promoted through the ranks to the position of acting secretary manager and later confirmed to that position.

On 05.12.2013 the respondent asked the claimant to go on a compulsory leave to facilitate investigations on the suspected improper acts by the claimant. Subsequently, the claimant was suspended from employment. The respondent reported the matter to the ministry responsible for co-operative development. The ministry undertook a statutory inquiry and the findings were that the claimant was not qualified to hold the office of the respondent's secretary manager and should be dismissed forthwith because she was unqualified and she was dishonest. In line with and in view of the inquiry's findings, the claimant was dismissed from employment.

The **1st issue** for determination is whether the dismissal was unfair. The court finds that throughout the proceedings from the imposition of the compulsory leave to suspension to statutory inquiry and finally the dismissal, the claimant was aware of the case that confronted her. Taking the steps cumulatively, the court finds that the claimant was accorded a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Further, the claimant participated in the statutory inquiry and was entitled to appeal as per provisions of the section 74 of the Co-operatives Act. The claimant's position is that she did not appeal because she never saw the inquiry decision until the report had been filed in court. Even if that was the position, the court finds that as at the time of termination the respondent has established that it acted as per the inquiry report and the court returns that the reason for termination was valid as envisaged in section 43 of the Employment Act, 2007. Thus, the court finds that the termination was not unfair.

The **2nd issue** for determination is whether the parties are entitled to the remedies as prayed for. The court makes findings as follows:

a) The counterclaim is founded upon the statutory inquiry's findings and then the audit report by John Wills & Associates. The inquiry report recommended a surcharge against the respondent's committee members as set out in the report. There was no recommendation that the claimant be surcharged. On the other hand, the audit report did not specify any cash lost and squarely recoverable from the claimant. In any event, there is no evidence that the claimant was accorded an opportunity to defend herself in view of the audit findings and in absence of such administrative disciplinary findings the court returns that the counterclaim has not been established.

b) As the court has found that the termination was not unfair, the court returns that the claimant is not entitled to any of the remedies as prayed for.

In conclusion judgment is hereby entered for the parties for dismissal of the memorandum of claim and the counterclaim with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at **Nyeri** this **Friday, 4th November, 2016.**

BYRAM ONGAYA

JUDGE