



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 147 OF 2016

MIRIAM NKATHA RIUNGU.....CLAIMANT

VERSUS

MERU COUNTY INVESTMENT & DEVELOPMENT

CORPORATION.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 26.06.2016 through Mang'erere Bosire & Associates. The claimant prayed for judgment against the respondent for:

- a) Reinstatement.
- b) Maximum compensation.
- c) General damages.
- d) Costs of the suit.
- e) Certificate of service.
- f) Any other remedy the court deems fit to grant.

The memorandum of response was filed on 20.07.2016 through Binyenya Thurania & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent as the Director for Corporate and Support Services by the contract of employment dated 11.08.2015. The appointment followed an interview carried out by the Board. The claimant reported on duty on 01.09.2015 and helped to establish the respondent which was a newly established county government corporation per the Meru County Investment and Development Corporation. The claimant's case was that she was rated as a star performer with milestones in meeting her targets.

By the letter dated 09.06.2016 the claimant's employment was terminated. The letter addressed to the claimant and signed by the respondent's managing director one Joel Imitira stated thus,

“RE: TERMINATION OF CONTRACT

This is to advise you that your employment contract has been terminated with immediate effect. This is in line with clause 17 of your employment contract with the Corporation signed on 12th August 2015. You will be paid one Month’s gross salary in lieu of notice.

Kindly hand over the assets and documents of the Corporation to the Human Resource Manager.

Signed

Joel Imitira

Managing Director

CC: Board Chairman

Human Resource Manager”

The claimant testified that she was thereafter locked out of her office. It was her case that the respondent’s human resources manager had no knowledge about the claimant’s termination. The claimant testified that respondent’s chairman confirmed that he was not aware of her termination. It was her further case that on 25.05.2016 the respondent’s board had resolved that the grievances which had emerged between the managing director and the directors were to be amicably resolved at a management meeting but the managing director had failed to implement that board resolution. By an e-mail on 09.06.2016 at 08.24 the chairman confirmed that he was not aware of the claimant’s termination. The chairman confirmed to the claimant that there was no board decision that she is terminated in the manner the managing director had proceeded to do.

The respondent’s case was that after her employment, the claimant sought to by-pass the chain of command in the respondent’s Corporation as if she was in competition with the managing director. It was the respondent’s case that the claimant embarked to paint the managing director in bad light to the Board. The respondent’s case was that the said claimant’s alleged conduct amounted to insubordination and the managing director decided to terminate her employment. The managing director testified that the claimant was a good officer but there were teething governance issues as was expected in the young Corporation. The managing director, RW, testified that there were issues of misconduct but because he did not want to mess the claimant’s professional life, he gave her a soft landing per the termination letter.

The **1st issue** for determination is whether the termination was unfair. The court has considered the evidence and the law and returns that the termination of the claimant’s contract of employment was unfair. First, clause 17 of the contract of employment provided that the contract may be terminated by either party in good faith upon giving the other party one month’s prior notice or payment of one month’s gross salary in lieu of notice. Paragraph one of the contract of employment was clear that the contract was between the Corporation Board and the claimant. For clarity, section 11(1) of the Meru County Investment and Development Corporation Act, 2014 states that the Corporation shall appoint such staff as are necessary for proper discharge of its functions under the Act and upon such terms and conditions of service as it may determine. The court returns that by reason of the terms of the contract of employment, only the board could terminate under clause 17 of the contract and the evidence is that the Board never directed its mind to the ensuing termination and the termination was, by the managing director’s own evidence and as per the termination letter, the sole action of the managing director. Second, the evidence shows that there were valid emerging governance grievances and the Board had directed the same to be amicably resolved at a management meeting. In the opinion of the court such valid grievances would not constitute a valid reason for termination because a valid grievance amounts to unfair reason for termination under section 46(h) of the Employment Act, 2007. Third, the managing director alleged misconduct against the claimant but the misconduct was not established and if such misconduct existed, the legitimate process was to invoke section 41 of the Employment Act, 2007 on notice and hearing prior

to termination. It was not open for the managing director to invoke soft landing in favour of the claimant. While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The respondent is a public body and the claimant is a public officer. The claimant is protected by the provisions of Article 236 (b) of the Constitution of Kenya, 2010 that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The claimant desired to continue in employment and a vacancy in the position she held is still in place. In furtherance of the stated Article 236(b), the court finds that in the circumstances of this case there is no established bar to the reinstatement of the claimant back to her position as the respondent’s Director for Corporate and Support Services effective the date of the dismissal 09.06.2016 upon the terms and conditions of service per the contract of employment dated 11.08.2015 or such better terms and to continue in the respondent’s employment with full benefits unless lawfully terminated. For that purpose the claimant will report to the respondent’s managing director not later than 09.11.2016 at 9.00am for appropriate assignment of duty. Further and consequential to the reinstatement the claimant is entitled to pay for 4 months from the termination date 09.06.2016 to the date of resumption of duty 09.06.2016 being **Kshs.800,000.00** at Kshs.200,000.00 per month.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant’s contract of employment by the letter dated 09.06.2016 was unfair.
- b) The claimant is hereby reinstated back to her position as the respondent’s Director for Corporate and Support Services effective the date of the dismissal 09.06.2016 upon the terms and conditions of service per the contract of employment dated 11.08.2015 or such better terms as may be agreed or become applicable and to continue in the respondent’s employment with full benefits unless lawfully terminated, and, for that purpose, the claimant will report to the respondent’s managing director not later than 09.11.2016 at 9.00am for assignment of duty accordingly.
- c) The respondent to pay the claimant **Kshs.800,000.00**(less lawful statutory deductions) by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- d) The respondent to pay the claimant’s costs of the suit.

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

BYRAM ONGAYA

JUDGE