



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.343 OF 2013**

**BENJAMIN KAI CHILUMO .....CLAIMANT**

**VERSUS**

**MOMBASA WATER SUPPLY AND SANITATION LTD ...RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The claim herein is contained in the Amended Memorandum of Claim filed on 5/11/2012. The claimant avers that he was employed by the respondent from October 2006 under 3 years renewable contracts which ran continuously until 31/5/2012 when he was wrongfully and unlawfully dismissed by the respondent for alleged poor performance. According to the claimant the alleged poor performance was untrue and that he was not given a hearing before the dismissal. He therefore prays for declaration that his dismissal was wrongful and unlawful and that he should be awarded damages, 3 months salary in lieu of notice, 72 days leave, gratuity, certificate of service plus costs and interest.
2. The respondent filed his response on 10/2/2014 with the leave of the court. She denies liability for the alleged wrongful dismissal of the claimant. She avers that the claimant failed to discharge his duties as the Head of Finance despite several warnings as a result of which he was sent on compulsory leave on 5/4/2012 and thereafter dismissed on 31/5/2012 after a critical evaluation of his performance confirmed that he was unable to discharge his duties to the respondent.
3. The suit was heard on 30/10/2014 when the claimant testified as CW1 but the respondent called no witness to testify in defence. However all the documentary evidence filed by the two parties were admitted as evidence by consent. After the hearing both parties filed written submissions.

**CLAIMANT'S CASE**

4. CW1 explained that he was employed by the respondent from 2/10/2006 on 3 year renewable contract. The contract was renewed from September 2009 for further 3 years ending September 2012. His salary according to the payslips produced was ksh.222,000. He further explained that on 28/10/2008, he was deployed from finance to the Position of Project Manager in charge of Debit Collection which was like a demotion. Mr. Kithinji, the Internal Auditor took over as the Head of Finance. That was not right because the new Finance Head could not Audit himself without conflict of roles. That state of affair continued until the 3 years contract lapsed.
5. On 1/10/2009 CW1's contract was renewed as the Head of Finance, but he was made to continue working as the Project Manager until 11/5/2010 when he was deployed back to Head Finance. He however continued to discharge the duties of the Project Manager. CW1 maintained that he

discharged all the duties well and in the appraisal done on his performance in 2011 he scored 83.3% according to the evaluation report he produced. According to CW1 the said score meant that he met all his performance targets fully. He however admitted that on 14/12/2011 he received a warning letter accusing him of laxity at work. On 26/3/2012 CW1 was sent on compulsory leave for poor performance followed by a show cause letter dated 5/4/2012. He responded to the 2 letters on 11/4/2012.

6. Thereafter he filed this suit seeking injunction to stop his dismissal but he was served with a dismissal letter dated 31/5/2012 in court in June 2012. CW1 explained that on 24/5/2012 he was absorbed from non-performance allegation by the special committee of the Board but never the less it recommended for his termination as per his request in his response to the show cause letter. The full Board however disregarded the findings and recommendation of the Special Committee and proceeded to dismiss CW1 for poor performance. He contended that under the contract he was entitled to 3 months notice or salary in lieu of notice plus gratuity at the rate of 31% of basic salary per year of service excluding they years served under the lapsed contract. He prayed for salary in lieu of notice, gratuity, 72 leave days plus 12 months salary as compensation for unlawful termination and certificate of service.
7. On cross examination by the defence counsel, CW1 admitted that the contract signed on 16/12/2009 was effective 1/10/2009. He further admitted that he was appraised on 19/1/2011 but warned on 14/12/2011 almost after one year. He contended that another appraisal should have been done first before condemning him of laxity. He admitted that by his response dated 11/4/2012 to show cause letter, he asked for an exit plan which was accepted by the Special HR committee after it found him innocent. The said committee also proposed the payment of dues to CW1 although CW1 was not notified before he filed the suit.

#### ANALYSIS AND DETERMINATION

8. After carefully perusing and considering the pleadings, evidence and submissions there is no dispute that CW1 was employed by the respondent on 3 year fixed term contract in 2006 which was renewed from 1/10/2009 for another 3 years fixed term. There is also no dispute that CW1 was send on compulsory leave following an alleged poor performance of duty and thereafter served with a show cause letter in April 2012. The issues

for determination are whether the dismissal of the claimant was wrongful and unlawful and whether the reliefs sought ought to issue.

#### **Wrongful and unlawful dismissal**

9. No evidence was adduced to contest the claimant's evidence that he was cleared of the charges of non performance by the special committee on HR by its report dated 24/4/2012. As correctly contended by the CW1, no performance appraisal was done to form the basis for his dismissal. The uncontested evidence by the CW1 is that he was last appraised in January 2011 and scored 83.3%. According to RW1 the said rating meant that he had met all his targets. The court therefore finds on a balance of probability that the forced leave and the subsequent dismissal of the claimant from employment was unfair for want of a valid reason as required under Section 45 of the Employment Act. The dismissal was therefore not justified. It was made further unfair by the fact that he was dismissed without first being accorded an oral hearing as required under Section 41 of the Act or at all.
10. In addition to the foregoing, the court finds that the dismissal was wrongful because the claimant was entitled to continue working and earning benefits until the 3 year fixed term contract expired. The only bar to that entitlement would have been if he voluntarily resigned or he was terminated after 3 months written notice or was dismissed for a valid and fair reason. Having found herein above that there was no valid and fair reason to justify CW1's dismissal, the court further finds that it was wrongful to terminate CW1's services without serving him with 3 months notice as per clause 18 of the employment contract.

#### RELIEFS

11. In view of the foregoing findings, the dismissal of the claimant from employment by the respondent on 31/5/2012 is declared unlawful and wrongful. In addition the claimant is awarded damages for the wrongful termination of the fixed contract assessed at ksh.889,177 being 4 months gross salary for the unexpired period of the fixed term contract. It is trite law that damages for breach of contract is the gross pay the employee would have earned for the period of the breach. The claimant is also awarded Ksh.403,906.60 being pay in respect of 72 leave days not utilized. The said sum is calculated based on the claimant's basic pay of ksh.168,294.42 per month. The claimant is further awarded gratuity at the rate of 31% of annual basic salary for the 32 out of 36 months served under the last fixed term contract before the said wrongful dismissal. That works to ksh.1,669,478.46. Lastly the claimant is granted the prayer for certificate of service as prayed.

#### DISPOSITION

For the reasons and findings made above, judgment is entered for the claimant in the sum of Ksh.2,962,562.75 plus interest from 31/5/2012 until payment in full. He will also get certificate of service, costs and interest.

It is so ordered.

**Dated, signed and delivered this 27<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**