



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

**AT NAKURU**

**CAUSE NO. 365 OF 2013**

**JOSPHAT MUNKE OLE MPOE.....CLAIMANT**

**v**

**DAVID WAIGANJO KOINANGE.....RESPONDENT**

**JUDGMENT**

1. Josphat Munke Ole Mpoie (Claimant) filed a Memorandum of Claim against David Waiganjo Koinange (Respondent) on 28 October 2013 seeking

- a) A declaration that the suspension of the Claimant by the Respondent was unlawful, irregular and the same contravened the Employment Act No. 11 of 2007.
- b) An order for a perpetual/permanent injunction restraining the Respondent, his servants/agents from unilaterally dismissing, suspending, interfering with the Claimant's duties, harassing, threatening, intimidating and/or ejecting the Claimant from his official residence while under employment and while on duty at parcel L.R. No. 8669/3 being I.R. 14607 COBBS-G. CLASS FARM LTD (MUTHERA FARM) without any lawful reason to do so.
- c) A declaration that the Claimant is entitled to be given his unpaid salary from 1<sup>st</sup> January 2011 amounting to Kshs 3.4 Million at Kshs 100,000/- per month.
- d) A declaration that the Claimant is entitled to be given his unpaid leave allowance amounting to Kshs 200,000/- for the 2 (2) years worked.
- e) Interests on (c) and (d) above at court rates from the date of filing suit.
- f) Costs and interest at court rates.
- g) Any other relief this Honourable Court may deem fit to grant.

2. Together with the Memorandum of Claim, the Claimant filed a motion seeking temporary injunctive relief restraining the Respondent from dismissing or suspending him or ejecting him from the official residence.

3. On 28 October 2013, Ongaya J issued orders staying the suspension of the Claimant through a letter dated 25 September 2013, and restraining the Respondent from terminating the services or suspending the

Claimant from employment.

4. The order was served upon the Respondent but he breached it and on 30 October 2013, the Claimant filed an application seeking police help to enforce the initial order. The Court upon hearing this latter application directed the Claimant to report to the Police.

5. On 1 November 2013, the Respondent filed an application seeking to have the orders issued on 29 October 2013 stayed, discharged or set aside. The Claimant filed a replying affidavit to the application on 5 November 2013.

6. On 5 November 2013, the Court directed that the Claimant's motion and Respondent's application both be heard on 25 November 2013. The interim orders granted to the Claimant were extended.

7. Before both applications could be heard on 25 November 2013, as directed by the Court, the Respondent filed another application on 7 November 2013, seeking that the Court varies the orders given on 28 October 2013 and extended on 5 November 2013.

8. Ongaya J who heard this latest application *ex parte* on 7 November 2013, granted an order allowing the Respondent to access the Muthera Farm and directed that the application be served for *inter partes* hearing on 25 November 2013.

9. On 25 November 2013, the records bears that the interim orders issued on 28 October 2013 were extended with the concurrence of the parties. The parties also suggested that the main Cause be set down for hearing.

10. The Court further directed that the Cause be mentioned on 9 December 2013, to record consent and or for further directions.

11. But on 27 November 2013, the Claimant filed yet another application seeking to cite the Respondent for contempt for breach of the orders issued on 28 October 2013. The Court allowed the application and summoned the Respondent and 2 others to appear in Court on 9 December 2013.

12. The Respondent filed a replying affidavit to the contempt application on 9 December 2013.

13. On 9 December 2013, the parties informed the Court that they were attempting to resolve the matter out of Court and the Court directed that the Cause be mentioned on 10 February 2014 to record consent on compensation to be paid to the Claimant and accounts to be taken.

14. On 10 February 2014, the Respondent did not attend Court. The Claimant's counsel informed the Court that there was no consent and the Court directed that the main Cause be heard on 14 April 2014, but the Court did not sit on 14 April 2014. The Deputy Registrar ordered the parties to appear before the Judge on 8 May 2014.

15. On 8 May 2014, the parties agreed by consent that the main Cause be heard 25 June 2014, but the hearing did not proceed again. By consent of the parties again, the Court fixed the hearing on 26 November 2014.

16. When the Cause was called up for hearing on 26 November 2014, only the Claimant and his counsel were present. After satisfying myself that the hearing date was taken by consent of both parties, I allowed hearing to proceed.

### **Claimant's case**

17. The Claimant's pleaded case is that he was employed as a farm manager/security head of Muthera Farm by the 4 Administrators of the estate of Mbiyu Koinange on 1 January 2011, and that on 25 September 2013, the Respondent being one of the administrators unilaterally and without the mandate of

the other administrators purported to suspend him from employment.

18. The Claimant contended that the suspension was unprocedural and irregular and indefinite and contravened Court orders issued on 19 November 2009 in High Court Succession Cause No. 527 of 1981 and on 24 July 2013 in Nairobi ELC No. 224 of 2013, and section 41 of the Employment Act, 2007.

19. He further pleaded that he was not accorded a hearing before the suspension contrary to the rules of natural justice and article 47 of the Constitution and that the suspension amounted to summary dismissal.

20. The Claimant also pleaded that the Respondent had threatened to evict him from the official residence.

21. Further, the Claimant pleaded that he had not been paid wages and allowances totalling Kshs 3,600,000/- as at time of filing suit at rate of Kshs 100,000/- per month.

22. The Claimant testified. He stated that he was employed by the administrators of the estate of Mbiyu Koinange at Muthera Farm on 1 January 2011, as a supervisor/manager and was issued with an appointment letter of even date. The agreed remuneration was Kshs 100,000/- per month.

23. On 25 September 2013, he was given a suspension letter signed by the Respondent. The letter accused him of embezzlement and tribalism among other allegations. The suspension came after he had worked for 2 years and 10 months. He stated he did not go on leave upto time of suspension.

24. He stated that the suspension by one administrator was unlawful and made reference to the Court order in High Court Succession Cause No. 527 of 1981.

25. He also stated that he had not been paid since employment but survived on farming 10 acres of the farm and produced the documents annexed to the Memorandum of Claim and 2 letters dated 9 December 2013 and 20 January 2014.

## **Evaluation**

26. The Court has considered the pleadings, documents, testimony and submissions filed by the Claimant (the submissions were filed on 3 February 2015 instead of by 5 December 2014 as directed).

27. This is an undefended Cause and it is not about unfair termination or wrongful dismissal but about the fairness of the suspension and non fulfillment of contractual terms.

28. According to an affidavit of service sworn by Douglas Mungai and filed in Court on 30 October 2013, the Respondent was served with Summons and Memorandum of Claim and other documents on 29 October 2013.

29. The Respondent should have filed a Response on or before 13 November 2013. There is no Response on the record.

30. The consequence is that the facts as presented by the Claimant are uncontroverted. There are no real issues in dispute on the record.

31. The Claimant produced his letter of appointment indicating he was appointed as a temporary supervisor. The Court finds that indeed he was an employee of the estate of Mbiyu Koinange duly appointed by the administrators.

## **The suspension**

32. The Respondent issued the Claimant with a suspension letter dated 25 September 2013. The Claimant asserted the suspension was irregular and unlawful because it was not sanctioned by the other

administrators. The suspension was also for an indefinite period.

33. Suspension from employment, especially without pay, should have either a contractual or statutory basis or it would be in breach of contract. (**see McClory v Post Office (1993) IRLR 159 and McKenzie v Smith (1976) IRLR 345**, and which I endorse as setting the correct principles even applicable within our jurisdiction).

34. Further, the decision to suspend should have been taken in consultation with the other administrators. No wonder, the other administrators through their advocate's letter dated 11 October 2013 opposed the suspension.

35. The suspension of the Claimant was unlawful and unfair because it was not based on any contractual provision.

36. The Court also noted that the Respondent through his letter dated 9 December 2013 appeared to have pulled back and allocated the Claimant duties.

### **Remuneration and other contractual entitlements**

37. The letter of appointment did not provide one of the *essentials* of an employment contract that is remuneration as consideration. The unchallenged evidence of the Claimant is that remuneration was agreed at Kshs 100,000/- per month. The Court accepts that evidence.

38. The Claimant's further testimony was that he had not been paid any salary from time of employment until time of filing of suit. By time of hearing, he had equally not been paid. He would be entitled to wages. As at time of judgment, i.e. total of 50 months the Claimant would be entitled to wages amounting to Kshs 5,000,000/-.

39. Pursuant to section 28 of the Employment Act, 2007 an employee is entitled to at least 21 days annual leave with full pay.

40. The Claimant would be entitled to the equivalent 4 months pay in lieu of leave amounting to Kshs 400,000/-.

### **Conclusion and Orders**

41. The declarations sought by the Claimant would not be appropriate and effective remedies in the circumstances of this case where fundamental rights and freedoms are not directly implicated.

42. A perpetual/permanent injunction will also not be appropriate because an employment relationship must come to an end at some point in time.

43. From the foregoing, the Court finds and holds that the suspension of the Claimant was unlawful and that the Claimant is owed salary and outstanding leave and awards him and orders the Respondent to pay him

a. Salaries upto February 2015      Kshs 5,000,000/-

b. Accrued pay in lieu of leave      Kshs 400,000/-

TOTAL                                      Kshs 5,400,000/-

44. The Claimant through his advocate's letter dated 20 January 2014 admitted owing Kshs 800,000/-. This sum should be deducted from the awarded sum.

45. The Claimant did not file submissions as directed but filed the same only 3 days before date set for

delivery of judgment. For this he is denied costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Kanyi instructed by Kanyi Ngure Advocates for Claimant

Mirugi Kariuki & Co. Advocates for Respondent