



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 32 OF 2014

HAVELOCK LIHANDA.....CLAIMANT

v

UASIN GISHU COUNTY SERVICE BOARD.....RESPONDENT

JUDGMENT

1. On 7 June 2013, the Interim Head of Human Resource, Uasin Gishu County wrote a show cause letter to Havelock Lihanda (Claimant) asking him to show cause within 7 days why disciplinary action should not be taken against him for colluding with owners of lock up shops/kiosks within the jurisdiction of the County to defeat the county's mandate of revenue collection and development control.
2. The Claimant responded to the show cause letter through a letter dated 17 June 2013.
3. On 18 November 2013, the Uasin Gishu County Human Resource Manager wrote to the Claimant informing him that the County Public Service Board had resolved to dismiss him for being careless and negligent in his duties contrary to section 44(4)(c) of the Employment Act, 2007.
4. The dismissal letter advised the Claimant that he had 14 days within which to appeal.
5. On 22 November 2013, the Claimant appealed to the Public Service Commission of Kenya and on 12 February 2014, the Claimant commenced legal proceedings against the Uasin Gishu County Service Board alleging that his dismissal was unfair, unjustified, biased, orchestrated with malice, unprocedural and against the Urban Areas and Cities Act, 2011, the County Government Act, the Employment Act and the Constitution.
6. The Respondent was served and it filed a Response under protest on 18 March 2014. On the same day, the Cause was mentioned before Ongaya J and hearing was fixed for 23 September 2014.
7. However, because of the transfer of judges, the Cause could not proceed to hearing on 23 September 2014, and Ongaya J in the presence of Mr. Ayieko for the Claimant and Mr. Sonkok for the Respondent, fixed the hearing for 4 February 2015.
8. When the Cause was called out for hearing on 4 February 2015, the Respondent and or its counsel on record, Kimaru Kiplagat & Co. Advocates were absent. Because the hearing date had been fixed in the presence of both parties, the Court allowed the hearing to proceed.

Claimant's case

9. The Claimant's case is that he was employed by the Municipal Council of Eldoret in 2000 as a Plant Operator. He then undertook a course in land survey and upon completion he was redeployed to the Surveillance section as a Surveillance Officer.
10. The Claimant stated that on 6 May 2013, he had issued a notice (signed by the County Secretary) to owners of structures on road reserves that their Temporary Occupation Licenses had been withdrawn and therefore they should remove the structures and vacate within 14 days.
11. The Claimant also stated that on 28 May 2013, while on routine duty he came across some 10 lock

- up shops erected within Eldoret Central Business District. Some were also under construction. He asked the developers to show him the approval for the construction but they gave him a copy of a court order dated 27 May 2013, issued in Eldoret CMCC No. 281 of 2013, *Martin Njuguna & 111 Ors v Municipal Council of Eldoret* in which the Court had granted a permanent injunction restraining the Municipal Council of Eldoret from interfering with the traders.
12. When he brought the Court order to the notice of his superiors, they informed him they were aware of the order.
 13. The Claimant also stated that on 7 June 2013, he received a show cause letter asking him to show cause why disciplinary action should not be taken against him and he responded to the letter on 17 June 2013.
 14. After the show cause, he was invited to appear a Disciplinary Committee which he did, and that after the hearing, the Human Resource Officer Mr. Nyabando told him he had been absolved, and he went back to work.
 15. But on 18 November 2013, he received a summary dismissal letter and on 22 November 2013, he appealed to the Public Service Commission. The Public Service Commission through its letter dated 3 November 2014, (exh 7) informed him that his appeal had been allowed.
 16. The Claimant further stated that he gave the Respondent's County Secretary a copy of the letter by the Public Service Commission allowing his appeal, but the Secretary told him to await communication but up to time of hearing there had been no response.
 17. The Claimant stated that he was seeking reinstatement.

Respondent's pleaded case

18. The Respondent filed a Response denying the capacity it was sued and pleading that the *Uasin Gishu County Public Service Board* is not aware or affiliated to Uasin Gishu County Service Board (the word *Public* is missing from the party sued by the Claimant).
19. In this regard, *Uasin Gishu Public Service Board* denied any employment relationship with the Claimant.
20. Ultimately, neither the Respondent nor the *Uasin Gishu County Public Service Board* attended the hearing to pursue the anomaly or capacity of the Respondent to be sued and the legal consequences thereof.

Evaluation

21. Pleadings comprise of facts constituting the cause of action and need to be proved in evidence. The facts asserted in the Response therefore remain just that, facts which needed to be proved.
22. The Respondent did not appear in Court to prove the same.
23. However, the Claimant was put on notice when it was served with the Response about the capacity and or real employer of the Claimant. The Claimant could have made the necessary amendments but it did not.
24. But in order to do substantive justice, the Court will proceed to examine the Cause on the material/evidence placed before the Court.
25. The public service is guided by the provisions of the Service Commission Act. Appeals to the Public Service Commission are part of the procedural fairness safeguards to employees such as the Claimant.
26. The Claimant's employer took a decision to dismiss the Claimant. It informed the Claimant of the right to appeal. The Claimant appealed and his appeal succeeded.
27. The Claimant had appealed on 22 November 2013 against the dismissal. The Public Service Commission communicated its decision on the appeal on 3 November 2014. The Claimant filed the instant action on 12 February 2014, alleging unfair termination. This was before the Public Service Commission had made a decision on his appeal (Court was not told whether a dismissal is put on hold pending appeal under the Regulations or not).
28. The filing of the Cause may have been premature and indeed it is debatable whether *unfair termination* is a competent cause of action before express statutory disciplinary provisions (on appeal) in the public service have been exhausted, but the Court was not addressed on the timelines provided for in the Service Commission Act, and therefore it will say no more.

29.It is not clear why the Respondent failed to reinstate the Claimant when the Public Service Commission allowed his appeal. That should have been the natural and logical thing to do.

30.The Court would therefore allow the Claim and order the Respondent to reinstate the Claimant without lose of benefits.

Costs

31.The Claimant was put on notice as to the correct and proper name of the employer. It did not seek to make any amendments. The Court will treat this as an irregularity which has not caused any of the parties prejudice but decline to award the Claimant costs of the Cause.

Conclusion and Orders

32.The Court grants prayer 2 of the Statement of Claim and orders that the Claimant be reinstated to his duties and/or place of work as per the terms and conditions of contract between him and the Respondent without lose of benefits from date of dismissal.

33.There will be no order as to costs.

Delivered, dated and signed in Nakuru on this 27th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ayieko instructed by Onyinkwa & Co. Advocates

For Respondent Kimaru Kiplagat & Co. Advocates (did not appear at hearing)