



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 414 OF 2014**

**ALOME KASERA ACHAYO ..... CLAIMANT**

**VERSUS**

**MOMBASA WATER SUPPLY & SANITATION COMPANY LIMITED ..... RESPONDENT**

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

**INTRODUCTION**

1. This is a case of premature termination of a fixed contract by the employer. The Claimant avers that the premature termination was wrongful and unfair because it was both substantially and procedurally unfair. Consequently she prays for damages amounting to 12,669,124.00 in respect of salary in lieu of notice, salary for the unexpired period of the contract term, compensation for unfair termination, gratuity and leave days earned.
2. The Respondent admits that she had employed the Claimant as her Managing Director (MD) for a period of 3 years but she terminated the Claimant's employment after 22 months into the contract term. It is the defence case that the said termination was fairly and lawfully done as the Claimant was accorded a fair hearing.
3. The suit was heard on 9<sup>th</sup> February 2015 and 10<sup>th</sup> February 2015 when the Claimant testified as CW1 and the Respondent called Rhoda Malemba Mwashigadi and Rajab Baabu Idi as RW1 and RW2 respectively. After the close of the hearing, counsel for both parties filed written submissions.

**Claimant's case**

4. CW1 was employed by the Respondent as Managing Director for a 3 year renewable contract starting 1<sup>st</sup> October 2012. The contract was to end on 30<sup>th</sup> September 2015 and his starting gross salary was Kshs.300117 per month but later reviewed to Kshs.356122. She produced the contract and payslip for July 2014 as Exh. 2 and 8 respectively.
5. In mid 2014 CW1 fell into problems with some officials of Mombasa County Government. For example on 26<sup>th</sup> June 2014 CW1 sought for leave from RW1 because she had not gone for any since appointment, but she was told that she could only go for leave after consulting the County Government. To her shock she received a letter the following day sending her to a compulsory leave and requiring her to hand over to an acting Managing Director. On 23<sup>rd</sup> July 2014 she was served with 23 charges of misconduct while still on compulsory leave. She was also invited to hearing before the Board on 7<sup>th</sup> August 2014 where she was only allowed to attend alone. She was also not supplied with relevant documents which she had requested for, to help her defend herself.

6. Only 4 Directors attended the hearing which turned out to be a casual meeting whereby the Chairperson (RW1) told her to be accommodative to the County Government. When CW1 agreed with the advise from the chair she was told to report to work the following day morning and the meeting ended at 6.00 p.m. According to CW1, no minutes were recorded in the meeting. CW1 prepared payment for the Directors for the day's attendance and she remained in the office while the Directors left. On 8<sup>th</sup> August 2014 CW1 reported to work and at 12.00 p.m. she called the chair of the Board to the office to oversee the taking over of the CW1 from the Acting Managing Director. To her shock, the chair of the Board (RW1) served her with a termination letter dated 8<sup>th</sup> August 2014 (Exh. 8). The letter did not state any reason for the dismissal but only stated that her services were no longer required. She was not paid any dues but on 5<sup>th</sup> February 2015 the Respondent allegedly transferred Kshs.2,090,728 to CW1's bank account secretly and did not give any particulars of the payment to her.
7. CW1 contended that the meeting did not resolve that she was to be dismissed. She further contended that the termination was unlawful and has totally mutilated her career. She therefore prayed for 6 months salary in lieu of notice (Kshs.2,136,732), salary for the unexpired period of the contract being 14 months (Kshs.4,985,708), gratuity being 25% of the basic pay (Kshs.252,122) times 36 months (Kshs.2,269,098), 33.5 leave days (Kshs.252,122) and compensation for unfair termination being 12 months gross salary (Kshs.3,025,464).
8. On cross examination by the defence counsel, CW1 admitted that Clause 5(b) of the contract disallowed her from accumulating leave days but she contended that although she applied for leave, the pressure of work did not allow her to be away. She denied any wrong doing and contended that her termination was in breach of Clause 6 of the Service Provision Agreement (SPA) between the Respondent and the Coast Water Service Board which bar the Respondent from changing her senior managers without prior consultation. CW1 contended that minutes of Board meeting of 7<sup>th</sup> August 2014 filed by the Respondent not genuine and did not reflect what transpired at the said meeting. According to her she was never asked to answer the specific charges at the meeting of 7<sup>th</sup> August 2014 as provided for in the Respondent's Disciplinary Manual.

### **Defence Case**

9. RW1 is a member of the County Public Service Board for Taita Taveta County. At all material times to this suit she was the chair of the Respondent. She stated that CW1 was the Managing Director from 18<sup>th</sup> September 2012 to August 2014. She explained that in June 2014, there arose issues which led to the Board to send CW1 to a compulsory leave so as to do investigations on the said issues which were deemed to be misconduct on CW1's part. On 23<sup>rd</sup> July 2014 the Board served CW1 with several charges and asked her to respond in writing. CW1 was then invited by the Board to a hearing on 7<sup>th</sup> August 2014. She requested to be supplied with some documents before the hearing but she was not given. She confirmed that CW1 denied all the charges. Never the less the Board decided to terminate CW1's contract under Clause 8 of the contract. According to RW1, the termination was fair because CW1 was given a hearing and was not denied her dues.
10. On cross examination by the Claimant's counsel, RW1 stated that she was a member of the Board for 3 years from 25<sup>th</sup> July 2011 to 24<sup>th</sup> July 2014. She contended that her term was renewed but she did not have any evidence of the renewal in writing. She admitted that CW1 was given the reasons for her compulsory leave on 23<sup>rd</sup> July 2014 after she asked for the same on 30<sup>th</sup> June 2014. RW1 admitted that CW1 was never given the documents she requested for purposes of preparing her defence. CW1 was also not allowed to be accompanied by a fellow employee of her choice during the hearing. RW1 admitted that the Board meeting ended at 6.00 p.m. She further admitted that CW1 maintained that she was innocent in all the charges and because she became acrimonious and making amicable resolution impossible, the Board abandoned the disciplinary process of going from one charge to another. Instead, the Board decided to use the exit clause in the contract. Consequently, the following day CW1's services were terminated and she was promised to be paid her dues. The dues were eventually paid on 6<sup>th</sup> February 2015. She admitted that the SPA between the Respondent and the Coast Water Services Board required for consultations before change of senior management officers by the Respondent. RW1 admitted

- that the said consultation was not done before CW1 was dismissed.
11. RW2 is the Chief Officer Water in the County Government of Mombasa. He confirmed that CW1 was the Managing Director for the Respondent. In December 2013, he met with CW1 informally to iron out issues because the Respondent is a company owned by the County Government. He met CW1 again in a formal meeting on 7<sup>th</sup> August 2014 for disciplinary hearing of CW1 by the Board. CW1's employment was eventually terminated and paid six months' salary in lieu of notice being Kshs.2,090,728.
12. On cross examination by the Claimant's counsel, RW2 admitted that the alleged misconduct done by CW1 was never reported to PPOA or EACC. RW1 did not remember when the Board meeting ended on 7<sup>th</sup> August 2014 but after the meeting CW1 was sent out and told that she would know the decision of the Board the following day. He maintained that the minutes filed by the defence were a reflection of the proceedings of the Board regarding CW1's case. He admitted that CW1 was not accompanied by another employee and she was not given the documents she requested for before the hearing. He admitted that CW1 was discharged on 8<sup>th</sup> August 2014 but her dues were not paid because she went to court in addition to there being no money to pay her immediately. He admitted that the dues were later paid secretly into her account. He maintained that under Clause 8 of the Contract of employment either party was entitled to terminate the contract with a notice of 6 months or salary in lieu of notice.

### **Analysis and Determination**

13. After considering the pleadings, evidence and submissions, it is clear that CW1 was employed by the Respondent as the Managing Director for a renewable 3 year fixed term contract. It is not in dispute that her contract was terminated on 8<sup>th</sup> August 2014 when there were still 14 months remaining before the lapse of the contract. There is further no dispute that the termination letter did not cite any reason for dismissal but only stated that the termination was done under Clause 8 of the contract of employment. The issues for determination are whether the premature termination of the Claimant's contract was wrongful and unfair, and whether the reliefs sought by the Claimant should be granted.

### **Wrongful and unfair termination**

14. The letter of termination dated 8<sup>th</sup> August 2014 stated:

***“Following a Board meeting on 7<sup>th</sup> August, 2014, it was unanimously resolved that your services are no longer required in this company.***

***Consequently therefore and pursuant to Clause 8 of your employment Contract, this is to inform you that the effect of this termination is immediate.***

***However, you will be paid your salary in lieu of notice, in tandem with the provisions of your employment contract as hitherto mentioned, net of statutory deductions and liabilities if any.”***

15. The foregoing excerpt of the termination letter corroborates the evidence of the RW1 when she said that the Board abandoned the disciplinary hearing after CW1 became acrimonious. Instead, the board decided to use the exit clause under the employment contract being Clause 8 which entitled either party to terminate the contract by six months notice or salary in lieu of notice. The said Clause 8 is duplicated below,

***“8. Notwithstanding anything herein before contained either party may terminate this Agreement at any time by giving to the other not less than 6 (six) months' notice in writing of their or her intention in that behalf of such notice to expire on any day of the month (or pay six months gross salary in lieu of notice) whereupon the contract of employment and service created hereunder shall be determined accordingly.”***

16. Although it is trite law that the whole term of a fixed contract of employment constitutes the notice period for terminating the contract, it is also trite that parties to a fixed term contract can agree on a premature termination clause, like in the present case. The foregoing view is founded on the parties' freedom of contract which in Kenya is anchored in Section 36 of the Employment Act. The said statutory provisions entitles either party to an employment contract to terminate the contract by notice or without notice provided that the terminating party pays the other one, a sum equal to the earnings he would have earned during the notice period. In that respect, the court finds that Clause 8 of the contract of employment entitled the Respondent to terminate the Claimant's contract of service with or without any notice and without citing any reason at any time even after meeting CW1 on 7<sup>th</sup> August 2014. The Claimant who is fairly literate must have read and understood the contract before signing it. By appending her signature to the contract with Clause 8 intact CW1 accepted that she could be dismissed at any time by being given six months notice or salary in lieu of the six months notice. The issue of failure to cite and prove the reason for dismissal or to prove procedural fairness does not therefore arise because the Respondent voluntarily abandoned the disciplinary process and used the exit clause. The court will even not deal with whether the Board was properly constituted although the matter was raised by the claimant while cross examining RW1. That issue will be left for other fora to deal with. For the foregoing reason therefore the court finds and hold that the termination of the Claimant's employment vide the Respondent's letter dated 8<sup>th</sup> August 2014 was neither wrongful nor unlawful and unfair, but proper within the terms of the contract and the law. The first issue is therefore answered in the negative.

### **Reliefs**

17. The answer to the issue of remedy to the Claimant for the termination of the contract by the Respondent under Clause 8 of the contract aforesaid is contained in Clause 9 of the contract which provides thus,

***“9. With effect from the date this agreement is signed, if this agreement is terminated by the Board under the provisions of Clause 8, the Board shall, subject to statutory deductions and as compensation for loss of employment, pay to the employee the gross salary, benefits and allowances for the entire period not served under this contract based on the gross monthly salary ruling at the point of termination, an amount equivalent to all leave earned and accrued due but not taken by her at the date of such termination and six months gross salary in lieu of notice together with a pro-rata of the emoluments set out in Clause 4 of the Agreement.”***

18. The foregoing excerpt of the contract is very clear and unambiguous on the Claimant's benefits in case her contract was to be prematurely terminated by the employer. The benefits include gross salary, accrued benefits plus allowances for the entire period of the unexpired term of the contract. In addition she is entitled to six months notice or gross salary in lieu of the said notice. Lastly she is to be paid a sum equal to the leave days earned but not utilized plus other emoluments provided under Clause 4 of the contract on pro rata basis. The said emoluments include salary, leave allowance equal to one month's basic salary and gratuity equal to 25% of the basic salary received by the Claimant in the preceding year for every month of service completed.

19. The Claimant has prayed for all the aforesaid benefits plus compensation for unlawful dismissal equivalent to her 12 months gross salary. In view of the said provisions of Clause 9 of the contract the court awards the Claimant, as prayed, six month's salary in lieu of notice (Kshs.2,136,732), Salary for the entire 14 months period of the unexpired term of the contract (Kshs.4,985,708), and 33.5 leave days earned (Kshs.252,122). According to the leave form dated 7<sup>th</sup> May 2014 filed by the defence, the leave days not utilized were 33.5 which is equivalent to Kshs.281,536.23. The court however will not award more than what is pleaded. Lastly the Claimant is awarded gratuity on pro rata basis for the 22 months served upto 8<sup>th</sup> August 2014 being Kshs.1,386,671 calculated at rate of 25% of the monthly basic salary. The court has applied the salary of Kshs.356,122 pleaded by the Claimant and supported by her payslip for July 2014 produced as Exh. 9. The sum awarded above will be paid less Kshs.2,090,728 paid to CW1 in

February 2015. The court has therefore dismissed the contention by the defence that CW1's dues should be assessed under Clause 10 because that is neither supported by evidence or the contract itself.

20. In view of the finding that the premature termination of CW1's employment was proper, the court will not declare it unlawful, unjustified and unfair. Likewise the court will not award any compensation for unlawful termination either in form of general damages or salary.

### **Disposition**

21. For the reasons stated above judgment is entered for the Claimant in the sum of Kshs.8,761,233 less Kshs.2,090,728 already paid leaving a net of Kshs.6,670,505 plus costs and interest.

**Signed, dated and delivered at Mombasa this 27<sup>th</sup> day of April 2015.**

**O.N. MAKAU**

**JUDGE**