



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1005 OF 2013

REM OGODO OGANA CLAIMANT

VERSUS

KENYA SUGAR BOARD RESPONDENT

Mr. Githinji for the Claimant

Mr. Mwaniki for the Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 14th July 2009 as a Receiver Manager for the South Nyanza Sugar Cane Out-growers Company Limited (in receivership) herein after (SOC) at a monthly salary of Kshs.150,000. The Respondent approved the appointment on 24th April 2009.
2. A Deed of appointment was prepared on 8th June 2009 and presented to the Claimant on 2nd September 2009.
3. The Claimant took over the employment from one Sospeter Ndede who had been redeployed to the Respondent's head office in Nairobi.
4. In April 2009, the Respondent tasked the Claimant to prepare a status Report with recommendations on the way forward and submit to the Respondent, which the Claimant did on 4th May 2009.
5. In the said report, the Claimant recommended;
 - a. Sale of unserviceable equipment;
 - b. Development and execution of a more aggressive business line, including cane haulage;
 - c. Provision of an additional machinery for came haulage;
 - d. Meeting the Claimant's remuneration for a period of twelve (12) months, among others.
6. Similar recommendations had been given a year earlier by an internal Auditor named Augustine Bisuchi.
7. The status report was approved with the recommendation was approved by the Respondent.
8. The status report is marked appendix '5' and the Deed of appointment Appendix '4'.
9. It is the Claimant's case that the status report was approved by the Respondent and the recommendation therein however, no financial support was given to the Claimant to implement the report. The Claimant salary was paid in bits and trickles which amounted to Kshs.1.2 Million for the period July 2009 to March 2010. SOC could not generate enough money in its then state and fell in arrears to pay salaries for the Claimant and other staff members.
10. The Claimant continued with work and the Respondent expressed satisfaction in his work as per a true copy of an entry in the Chairman's visitors book by the Chief Executive Officer of the

- Respondent.
11. Due to inability to pay salaries, staff went on strike in July 2010 demanding to be paid and they made adverse claims against the Claimant.
 12. As a consequence of this, the Respondent conducted an audit of SOC and the auditors recommended to surcharge the Claimant for Kshs.672,540 *inter alia*. The audit was done by the person, the Claimant had replaced Mr. Sospeter Ndede, and in the Claimant's view was not impartial in doing the exercise. The report was produced as Appendix '8'.
 13. On 28th September 2010, the Respondent sent Mr. Sospeter Ndede, the person who conducted the audit to take over from the Claimant on interim basis and directed the Claimant to report to the Respondent's office at Nairobi for briefing on 7th October 2010 (see Appendix 9).
 14. The Claimant was asked to provide his management accounts on the audit report to facilitate conclusion of the report (see Appendix 10).
 15. The Claimant prepared the Management report addressing the issues raised including the alleged surcharge and submitted the same to the Respondent on 12th October 2010 (see Appendix 11).
 16. The Claimant admitted owing Kshs.94,650 out of the surcharge of Kshs.672,540. (see item 1 Appendix 4). The Claimant did not receive any response to his management report until when the matter came to Court.
 17. It was also agreed that Ksh.190,640 had been surcharged erroneously as per item 2 in Appendix '4'.
 18. It was also agreed that a further Kshs.210,000 expenditure was justified provided the Claimant provided certified copies of receipts since Respondent had misplaced the original receipts (see item 3 App. 14). The certified receipts were produced in Court by the Claimant, Respondent having refused to accept them saying that the audit was concluded.
 19. The matter of the balance of Kshs.177,250 has been outstanding until the matter came to Court, the Respondent having frustrated Claimant's effort to have a meeting to resolve the matter.
 20. A letter of demand was sent on 17th May 2013 and the Respondent wrote back denying liability in toto.
 21. The Claimant prays for judgment against the Respondent for;
 - a. salary arrears for the months of April 2010 to April 2011 at Kshs.150,000 per month in the sum of Kshs.1,950,000 less the admitted surcharge of Kshs.94,650 making a net amount of Kshs. 1,855,350;
 - b. interest on the amount;
 - c. Costs of the suit.

Memorandum of response and counter claim

22. The Respondent filed a memorandum of response and counter claim dated 10th September 2013.
23. The description of the parties is duly admitted including the appointment of the Claimant on 14th July 2009 as Receiver Manager of SOC. The Respondent however states that there was no contractual arrangement on the basis the Claimant was to be remunerated.
24. The Respondent admits the mandate given to the Claimant to financially turn around SOC which included:
 - a. to take over all assets and liabilities of SOC;
 - b. to manage affairs of SOC in a beneficial and profitable manner;
 - c. to prepare and send monthly and quarterly reports to the Respondent for regular circulation; and
 - d. be responsible for day to day management of SOC.
25. The Respondent states that the Claimant was to compensate himself the agreed salary of kshs.150,000 (gross) out of the income generated out of the receivership and revival of the Company.
26. The Respondent adds that it was a direct result of the Claimant's misappropriation of the Company's funds that saw staff of SOC go on strike due to unpaid salaries hence the audit

- conducted by the Respondent.
- 27.The Respondent states that the audit unearthed large scale misappropriation of the Company's assets in that;
- a. several trailers were leased under unclear circumstances;
 - b. examination of receipts revealed Kshs.1,645,000 had been received from the purported lease of six (6) trailers the list of which is annexed and marked Appendix '1' to the statement of response.
- 28.The Respondent denies all other averments in the memorandum of claim but admitted that the Claimant out of frustration resigned on 26th January 2011 giving the Respondent three months notice in terms of the letter of appointment Appendix '12' is the letter of resignation.
- 29.The Respondent further admits the meeting of 15th January 2012, was held at the Claimant's request between the Claimant and the senior staff of the Respondent namely Josphine Kisero, Mr. Ngeno and Sospeter Ndede to compare the audit report against the Claimant's management comments.
- 30.The Claimant submitted Appendix '4' to the response which was a summary by the Claimant of the issues raised in that meeting.
- 31.The Claimant denies the tabulation of figures by the Respondent under paragraphs 27, 28, 29, 30, 31, 32 and 33 of the statement of claim and puts the Claimant to strict proof.

Counter Claim

- 32.The Respondent counterclaims Kshs.837,540 in surcharge set out and particularized in paragraphs 7 and 8 of the counterclaim being;
- a. Benefits the Claimant unilaterally paid himself in respect of house rent; Kshs.5,000; security to his residence; Kshs.5,580; servant allowance, Kshs.5,000 which was a monthly expenditure of Kshs.15,580 translating to Kshs.202,540.
 - b. Kshs.180,000 overdraft at National Bank of Kenya which the Claimant failed to account for.
 - c. Kshs.405,000 unaccounted for receipts for purported leasing of trailers.

Total claim – 837,540.

- 33.The Respondent prays that the Claimant's suit be dismissed and the counterclaim be allowed with interest and costs to the Respondent.

Reply to the Respondent's memorandum of response and counterclaim.

- 34.The Claimant replied to the statement of response and the counter claim and filed same on 20th January 2014.
- 35.The Claimant reiterates the averments in the memorandum of claim and in addition;
- i. Denied that he was supposed to pay himself;
 - ii. Stated that he received no support from the Board to realize the objectives of his office and therefore SOC could not realize funds to pay salaries and operational expenses;
 - iii. Denies having misappropriated any funds as alleged or at all emphasizing that he was denied opportunity to meet the Respondent to conclude the audit matters hence there is no final audit report on which the Respondent could base its claims set out in its response and counterclaim;
 - iv. Denies all the particulars set out in the counter claim and puts the Respondent to strict proof;
 - v. The Claimant denies having received any demand from the Respondent and states that the counterclaim was a mere afterthought.

Oral testimony

- 36.The Claimant testified under oath. He presented his academic qualifications and experience as an indication of his suitability for the task granted him as a Receiver Manager of SOC upon

- competitive recruitment.
37. The Claimant told the Court that SOC was put under receivership by the Sugar Board to whom it owed bad loans.
 38. Upon appointment, the Claimant made recommendations to the Respondent and in that document, Claimant recommended that his salary be paid by the Respondent.
 39. Upon reporting to the office, Mr. Sospeter Ndede who was then in-charge did not prepare a handing over report to him. He just disappeared. He handed over eight (8) months later.
 40. By April 2009, he had however managed to prepare a station report with a restructuring proposal to the Head office including need to replace the dilapidated equipments which were expensive to use and maintain.
 41. The C.E.O. of the Respondent Rosemary Mkok visited the office and appreciated the good work the Claimant was doing.
 42. The Claimant was paid his salary of Kshs.150,000 for eight months and a balance of Kshs.1,950,000 was not paid for the period April 2010 to April 2011.
 43. The staff were also not paid on time hence the difficulties leading to the strike.
 44. The Claimant gave extensive testimony in support of the particulars of claim and withstood very intense cross examination by counsel for the Respondent.
 45. The overall position by the Claimant was that, he served the Respondent well. He was not paid 13 months salary and does not owe the Respondent any money. That the arrear salary be paid with interest and he be paid costs of the suit.
 46. RW1 was Sospeter Ndede who testified for the Respondent. He is currently the acting receiver manager of SOC which is still under receivership. His testimony may be summarized as follows;
 47. The Claimant had taken over from RWI. The Claimant did an under study of SOC before he assumed office and was employed on a salary of Kshs.150,000 a month. The Claimant requested that his salary be paid by the Kenya Sugar Board but the Sugar Board declined to pay the salary and asked the Claimant to generate his own salary.
 48. RWI produced the certificate of appointment with that term in the pre-amble. The Claimant was to pay himself. The Claimant could hire and fire staff and was supposed to manage his own pay roll.
 49. RWI denies that the Kenya Sugar Board is liable to pay the arrear salaries owed to the Claimant.
 50. RWI said when the Claimant took over from him SOC was running well and was able to pay its salaries, however, under cross examination, this was shown not have been the case. Instead, at the time, SOC was in financial dire straights and could hardly pay its salaries and debts owed, hence the placement on receivership.
 51. RWI was not candid at all in this respect. RWI confirmed that the Claimant worked from July 2009 up to and including April 2010. RWI confirmed that employees went on strike due to non-payment of salary and farmers could not be paid for cane delivered.
 52. An investigation team was put in place and he was a member of the same.
 53. RWI alleged that the team unearthed malpractices set out in the memorandum of response and attributed financial misappropriation to the Claimant.
 54. RWI stated that the Claimant was liable for the losses incurred as specified in the counterclaim and that, he ought to have paid himself salaries for the served period and the Respondent is not therefore liable.
 55. In conclusion RWI urged the Court to dismiss the main claim and uphold the counter claim with costs.

Determination

- i. Was the Respondent responsible for the remuneration of the Claimant?
- ii. Does the Claimant owe monies set out in the counter claim?
- iii. What remedy is available to either of the parties.

Issue i

56. A careful analysis of the pleadings together with the attachments and in particular the letter of appointment dated 14th July 2009, and the oral testimony of the parties has led the Court to the

- following conclusion of facts;
57. The Claimant was appointed to the position of Receiver Manager, South Nyanza Company (SOC) on 14th July 2009 by the Kenya Sugar Board, the Respondent.
 58. Letter of appointment was on the letter head of SOC and was signed by R. Mkok, the Chief Executive Officer of the Respondent.
 59. The Claimant signed the letter of appointment on 27th July 2009 *“having read and understood the terms and conditions of employment.”*
 60. The letter provided in the opening paragraph that *“you will be paid a salary of Kshs.150,000 per month which will be generated internally from your operations at SOC.”*
 61. This has become the bone of contention, the Claimant stating on one hand that the Respondent was responsible to pay his monthly salary and the Respondent stating on the other that, the Claimant was supposed to pay himself.
 62. It is indisputable fact that this contract of employment was between the Claimant and the Respondent.
 63. A plain reading of the contract of employment shows that the Respondent was the employer and the Claimant the employee.
 64. The contract could be terminated by either party giving three (3) months written notice to the other or one month’s pay in lieu of notice.
 65. From the evidence before Court, it has been shown that at the time the Claimant was employed, SOC was in financial dire straights, and the Claimant’s mandate was to engineer its recovery in order for SOC to start meeting its financial obligations which it was not in a position to meet then.
 66. The Court’s construction of the express words of the letter of appointment has led the Court to the conclusion that the Respondent being the employer was legally liable and indeed was bound to pay the monthly salary of Claimant in the sum of Kshs.150,000 per month. It could not have been the intention of the parties that the Claimant would not earn any salary until such time as he was able to generate sufficient income from SOC to pay his salaries.
 67. If this was the case, the contract itself would have been between SOC in receivership and the Claimant which is clearly not the case here.
 68. It is not in dispute that the Claimant worked the month of April 2010 to April 2011 and was not paid his monthly salary of Kshs.150,000 per month during the period.
 69. The Respondent is therefore liable to pay the arrear salary in the sum of Kshs.1,950,000 for the stated period and the Court so orders.

Counter claim

70. The Claimant admits owing the Respondent Kshs.94,650 out of the surcharge of Kshs.837,540 set out in the audit report and the counter claim.
71. The Court has also studied the letter of appointment carefully, and it does not provide for payment to the Claimant monthly house rent of Kshs.5,000; security for Claimant’s resident at Kshs.5,580 per month; monthly allowance for house servant in the sum of Kshs.5,000 which amounts the Claimant, in the Court’s view paid himself unlawfully.
72. The monthly payment in this respect was Kshs.15580 and it translates to Kshs.202,540 unlawfully received by the Claimant and the Court so finds.
73. The Court having considered the totality of the evidence before Court on the balance of the surcharge, has come to the conclusion that, the onus of proof was on the Respondent to prove on a balance of probabilities that the monies realized by the Claimant in the cause of his duties was not correctly applied back to SOC.
74. The sale and or lease of the trailers was done by the Claimant in the cause of his duties as a receiver manager. The documentation supplied by the Claimant clearly shows that the money was used in the operations of SOC including payment of arrear salaries to the staff who by the time were extremely restless and had even gone on strike leading to the premature termination of the contract of service of the Claimant.
75. It is the Court’s further conclusion that the Respondent did not provide a conducive environment for the Claimant to realize his objective of jumpstarting SOC to recovery in order for it to meet its financial obligations to the internal and external debtors.
76. The mission by the Claimant was doomed to fail from the start and from the evidence by RWI

- SOC has not recovered from financial doldrums to date.
77. The Court finds that the Respondent has failed to discharge its burden of proof with regard to the alleged misappropriation of the proceeds of the sold and or leased trailers in the sum of Kshs.405,000. The Respondent equally failed to show that the Kshs.180,000 gotten from an overdraft from National Bank was misappropriated by the Claimant.
78. The Court is satisfied that the Claimant used the monies available to him for the benefit of SOC in the course of his employment as a receiver manager.
79. The counter claim by the Claimant is therefore dismissed except;
- a. Kshs.202,540 which the Claimant paid himself outside the contractual arrangement;
 - b. Kshs.94,650, which the Claimant admitted having used since he was not getting his salary on time, both totaling Kshs.297,190.

Set-off

80. The sum of Kshs.297,190 is therefore set-off against the award of Kshs.1,950,000 awarded to the Claimant leaving a net award of Kshs.1,652,810.
81. The award of Kshs.1,652,810 is to be paid by the Respondent to the Claimant with interest at Court rates from date of filing this suit until payment in full.
82. The Respondent having failed to pay the Claimant lawfully earned salary for many months, is to pay the costs of this suit.

Dated and Delivered at Nairobi this 20th day of November, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE