



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 143 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2014)

JULIUS NYAROTHO ..... CLAIMANT

**-VERSUS-**

NZOIA SUGAR CO. LTD

THE ATTORNEY GENERAL ..... RESPONDENTS

**JUDGMENT**

The claimant herein filed his plaint on 5.6.2013 through the firm of Kasamani & Co. Advocates. He avers that by a Kenya Gazette Notice No. 5555 dated 12.5.2010 and contained in the Kenya Gazette Issue of 21.5.2010, the President of the Republic of Kenya appointed the plaintiff to be the chairman of Nzoia Sugar Company Limited for a period of 3 years. He took up the appointment and served for 13 months when another Gazette Notice No. 8003 dated 8.7.2011 signed by the President of the Republic of Kenya revoked his previous appointment and appointed one Lawrence Simiyu Sifuna to the claimant's position and backdated the appointment to 21.1.2011. The claimant was not satisfied with the turn of events and applied and obtained leave to apply for Judicial Review orders of certiorari and mandamus in Nairobi Misc Civil Appl. No. 182 of 2011 which was later transferred to Bungoma and became Bungoma Misc Civil Appl No. 36 of 2012.

By a judgment delivered on 15.4.2013 by **Hon. Justice F. K. Gikonyo**, in the Bungoma case, the claimant was granted orders sought and quashed Gazette Notice No. 8003 of 8.7.2011 which had revoked the appointment of the claimant as chairman.

It is the claimant's case that as chairman of the 1st respondent, he was earning an average of Kshs 135,000/= per month inclusive of allowances of Ksh 80,000/= per month honoraria less tax, allowances for meetings and travelling expenses. It is further the claimant's case that he had worked for 15 months of the 36 months contract leaving 21 months unserved. He now seeks to be paid what he would have earned during the 21 months which he puts at Kshs 3,240,000/=. He wants the court to make a finding that the respondents are jointly liable and order that they pay him accordingly plus costs and interest.

In cross-examination by 1st respondent's counsel, the claimant told court that his basic salary was Ksh 80,000/= subject to taxation and that the allowances were also taxed. He stated that the honoraria was being paid by the 1st respondent.

The respondents filed their respective defences. The 1st respondent filed their defence on 16.7.2013 through the firm of Kiarie & Co. Advocates. The 1st respondent's case is that the claimant's case is misconceived and bad in law as under the State Corporations Act, it is the sole mandate of the President

to appoint and even revoke appointments of its chairmen. That the 1st respondent cannot therefore be held responsible for the wrongful revocation of the claimant's appointment by the President and to that extent, the claimant's claim against the 1st respondent is misplaced and misdirected. The 1st respondent also denied that the claimant had 24 uncompleted months of contract nor that he was earning Ksh 135,000/= per month net statutory deductions. They also deny that costs were awarded in Bungoma HC Misc Civil Appl No. 36 of 2012 and therefore the claim of Ksh 670,000/= lacks legal basis and the same should be rejected. The 1st respondent therefore denies liability for the entire claim.

The 2nd respondent on the other hand filed their statement of defence on 26.10.2013 through their litigation counsel. It is the 2nd respondent's defence that they never made any decision leading to the revocation of the plaintiff's employment therefore cannot be liable for loss suffered by the claimant (if any). The 2nd respondent also avers that they cannot be liable for a decision made through a Gazette Notice issued by the Head of State. They aver that they are wrongly enjoined in this case. The parties herein have also filed their respective submissions.

Upon hearing the evidence from all parties and upon consideration of the submissions filed, the issues for determination by this court are as follows:-

1. **Whether the respondents can be held liable for an error/mistake of the President.**
2. **Whether the claimant is entitled to prayers he has sought.**

In answer to the 1st issue, 1st respondent is a State Corporation established under The State Corporations Act Cap 446 Laws of Kenya. Under S. 26 of Cap 446, The State Corporations Advisory Committee is established. The functions of the said Committee are listed under S. 27 of Cap 446 amongst them being:-

**“(c) Where necessary, advise on the appointment, removal or transfer of officers and staff of State Corporations, the secondment of public officers to State Corporation and the terms and conditions of any appointment, removal, transfer or secondment ---”**

Under S. 6 of Cap 446, the boards of State Corporations shall consist of:-

**(a) A chairman appointed by the President who shall be non – executive unless the President otherwise directs —**

**(b) The chief executive**

**(c) ---**

**(d) --- ”**

The revocation or removal of a member of the board is provided for under S. 6(2) of Cap 446.

I would not delve into the legality or otherwise of the removal of the claimant herein since the same was addressed by **Hon. J. Gikonyo** in the Misc Civil Appl No. 36/2012 at the High Court at Bungoma. **Hon. J. Gikonyo** made a finding that the revocation by the President of the claimant as chairman of Nzoia Sugar Co. Ltd was in violation of the law and he went ahead to quash the said decision. In the same decision, **Hon. J. Gikonyo** delved into who should be held liable for any error/mistake of the President. It is true that the President is the appointing authority of the chairmen of State Corporations. In deciding to exclude the presidency from the proceedings in his judgment at page 6, **J. Gikonyo** stated:-

**“The courts reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy whilst maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In such a suit as this, the Attorney General is the proper party ---” (emphasis is mine)**

I agree with the findings of **Hon. J. Gikonyo** that the Attorney General is the proper party on such a case to be held liable for any error/mistake of the President. In this case, the claimant sued both the 1st and 2nd respondents. The mistake of the 1st respondent is not however explained. There is no indication that the 1st respondent advised the President on the appointment or revocation of it's chairman. The 1st respondent never requested for the appointment of a chairman and never influenced the appointment. Under the State Corporation Act Cap 446, the State Corporations Advisory Committee was the one to advise the President on appointment and revocations on chairman and members of boards of Corporations. To enjoin the 1st respondent in this suit was therefore an error already alluded to by **Hon. J. Gikonyo** in his judgment. At pg 9 he stated:-

**“These proceedings are not proceedings against the President but against the State itself and any ensuing liability would certainly be liability of the State within the public law of the State. The Attorney General is not sued on vicarious liability but under Article 156(6) of the Constitution as the defender of the rule of law and public interest ---”**

In answer to this question then, it is finding of this court that indeed the 2nd respondent as chief government advisor should be held liable for any ensuing liability if at all. Since the 1st respondent had no control on who was or was not it's chairman, enjoining 1st respondent in the suit was an error and in any ensuing liability, the 1st respondent cannot be held liable and I therefore strike out the 1st respondent from these proceedings with orders that the claimant meets their costs of this suit.

On the 2nd issue is whether the claimant can be granted prayers sought? It is already established that the President erred in revoking the appointment of the claimant without due process. The claimant told court that he used to be paid Ksh 80,000/= per month as honoraria plus other allowances. The amount on totality of the other allowances is however not established as the payments would be made when the board sit or when the claimant travelled. The number of sittings of the board is not established and to award claimant anything as **“sitting allowance”** for meetings which are unknown will be an error.

I however find that indeed he was entitled to payment of Ksh 80,000/= monthly as honoraria and was to serve for 36 months. He had already served and been paid for upto 15 months with a balance of 21 months. The total honoraria he would have earned =

**21 X 80,000 = Kshs 1,680,000/= for which I award him since his appointment was unfairly and unlawfully revoked, I also award him 6 months equivalent of the honoraria payable =**

**6 X 80,000 = Kshs 480,000/=**

---

**TOTAL PAYABLE = KSHS 2,160,000/=**

=====

**Plus costs of this suit. I make no order as to costs arising in the Judicial Review matter which was not awarded.**

**HELLEN S. WASILWA**

**JUDGE**

**17/9/2014**

**Appearances:-**

Claimant present

Abande h/b Kasamani for claimant present

CC. Wamache