



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO.308 OF 2014**

**JOHN KIPKEMOI CHERUIYOT.....CLAIMANT**

**-VERSUS-**

**NAKURU WATER AND SANITATION COMPANY**

**LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> October, 2014)

**JUDGMENT**

The claimant John Kipkemoi Cheruiyot filed the memorandum of claim on 10.07.2014 through Kanyi Ngure & Company Advocates. The claimant prayed for judgment against the respondent for:

- a). A declaration that the dismissal of the claimant from employment on the 26.06.2014 by the respondent was unlawful, irregular and the same contravened the Employment Act specifically Section 41(1) of that Act.
- b). An order for the reinstatement of the claimant back to his employment in the same capacity as managing director with full salary and benefits in terms and in accordance with his contract of employment.
- c). An order for compensation for wrongful termination of Kshs.2, 964, 000.00 (arising from Kshs.274, 000.00 per month x 12 months) in terms of section 49(1) (c) of the Employment Act.
- d). An order for compensation for being publicly defamed and damages under heads of: (i) general damages; (ii) exemplary damages; and (iii) aggravated damages.
- e). In line with prayer (b) above, the respondent be compelled by court within seven (7) days of issuance of the order to re-print and publish a fair and accurate report of similar magnitude in the relevant newspapers to inform the public of the claimant's reinstatement to work.
- f). Costs and interest at court rates.
- g). Any other relief this honourable court may deem fit to grant.

The respondent's memorandum of defence and counterclaim was filed on 18.07.2014 through E.M.Juma & Ombui Advocates. The respondent stated that the claimant was not entitled to the reliefs as prayed for and the claimant's suit be dismissed with costs. The respondent further counterclaimed for Kshs. 20, 991, 235.00 being loss suffered as a result of the claimant's gross misconduct by failing and intentionally ignoring to nominate an advocate from the respondent's prequalified list of advocates to protect the respondent's interests in 7 taxation cases in which taxation notices had been served by Odhiambo & Odhiambo Advocates upon the claimant in his capacity as the respondent's managing director. The respondent's case was that the taxation had proceeded or would proceed in absence of the respondent's representation and the respondent stood to suffer huge financial loss in the cases as follows:

- a. Miscellaneous Civil Application No. 238 of 2013.....Kshs.3, 404, 916.00.
- b. Miscellaneous Civil Application No. 263 of 2013.....Kshs.3, 472, 243.00.
- c. Miscellaneous Civil Application No. 266 of 2013.....Kshs.3, 425, 635.00.
- d. Miscellaneous Civil Application No. 267 of 2013.....Kshs.589, 784.00.
- e. Miscellaneous Civil Application No. 270 of 2013.....Kshs. 4, 296, 303.00.
- f. Miscellaneous Civil Application No. 264 of 2013.....Kshs.3, 376, 108.00.
- g. Miscellaneous Civil Application No. 246 of 2013.....Kshs.2, 426, 246.00.
- h. Total claim.....Kshs. 20, 991, 235.00.

The claimant testified to support his case and also called a witness one David Kiprono Towett (CW). The respondent's witness (RW) was one of its directors, Geoffrey Makana Asanyo.

The claimant was employed by the respondent to hold the office of managing director with effect from 22.07.2008 as per the letter of appointment dated 15.07.2008 exhibit JKC1. Clause 5 of the contract provided that the employment was for 3 years commencing 22.07.2008 and the board reserved the right to terminate the contract prematurely depending on the claimant's performance. Clause 6 on renewal of appointment stated thus, **"Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract. However, renewal of the contract is subject to your performance and at the Board's discretion."**

In accordance with the renewal term, the claimant's contract of service was renewed effective 22.7.2011 for a further 3 year's term to expire on 21.07.2014. It was the claimant's case that he was eligible for a second renewal of the contract upon its lapsing on 22.07.2014. However, the claimant testified that the respondent failed to accord him the opportunity to appear before the relevant committee of the respondent's board of directors for appraisal with a view to renewing the contract. Instead, the claimant received on 27.06.2014 at 3.50pm the termination letter dated 26.06.2014 being exhibit JKC2 which was delivered to the claimant at his home. The letter signed by the chairman of the respondent's board of directors and addressed to the claimant stated as follows:

**"Dear Sir,**

**RE: RENEWAL OF YOUR CONTRACT AS MANAGING DIRECTOR**

**Reference is made to your letter dated 21<sup>st</sup> January regarding the above issue.**

**We regret to inform you that in a board meeting held on 26<sup>th</sup> June 2014, the Board of Directors declined renewal of your contract for following reasons:**

1. **In a board meeting held on 13<sup>th</sup> June 2014 vide letter Ref CMT/001/IO/IO, you were advised to take your pending leave days as the Board considers renewal of your contract and an acting Managing Director was appointed. While you were on leave you called for an Extra Ordinary General Meeting vide letter Ref W/9/A/2014/261/JKC/JKC dated 21<sup>st</sup> June 2014 to take place on 2<sup>nd</sup> July 2014 at Shimba Lodge Naivasha without any reference to the Board of Directors. According to Clause 21 of your employment contract, Employment Act Section 44 and the Company's Human Resource Manual Clause 8.2.2, this constitutes gross misconduct**

- and calls for summary dismissal.
2. While still on leave you wrote to Co-operative Bank, Nakuru branch advising them to disregard a board resolution regarding change of signatories with an intention to cripple the operations of the organization. This according to your employment contract Clause 21, Employment Act Section 44 and the Company's Human Resource Manual Clause 8.2.2 constitutes gross misconduct and calls for summary dismissal.
  3. Failure to nominate an advocate from the list of prequalified company advocates to protect the interest of the company in seven taxation cases between Odhiambo & Odhiambo Advocates and the company which you were served in August 2013. The cases were determined without the company representation on diverse dates between April 2014 to early June 2014 and are awaiting ruling which will have financial implication on the organization.
  4. Failure to discuss critical management issues with the Board of Directors and corporate management team before implementation.

In light of the above, your contract has been terminated with effect from 26<sup>th</sup> June 2014. Your remaining leave days upto 21<sup>st</sup> July 2014 will be paid accordingly. You are therefore required to do a proper handing over and clearance to the acting Managing Director as per the company regulations. Enclosed please find two copies of the clearance form.

On behalf of the Board of Directors, I wish to take this opportunity to wish you well in your future endeavors.

Yours faithfully,

Signed

**IBRAHIM OSMAN**

**CHAIRMAN BOARD OF DIRECTORS**

In his testimony, the claimant made explanations about the charges leveled against him in the termination letter as follows:

- a. While on leave he purported to convene the shareholders' meeting as requisitioned by the shareholders and as directed by the Governor, Nakuru County as per the letter dated 19.06.2014 being exhibit JKC6.
- b. While on leave he wrote to Co-operative Bank because he felt he was still responsible for company funds and it was improper and contrary to policy for the respondent to change the signatories while the claimant was on leave.
- c. The taxation of the bills filed in the cases was outside the claimant's power because the taxation was to be undertaken by the taxing master, the taxation had not taken place and the claimant stated that he had instructed the respondent's counsel, Githui & Company Advocates to take necessary steps in the cases.
- d. The claimant testified that he had been dismissed without due procedure which involved a show cause letter allowing a response in 48 hours; appearance before the relevant staff disciplinary committee for the hearing in presence of a workmate; and action in accordance with the recommendation by the committee.

The claimant lamented that he did not attend the board meeting of 26.06.2014 that terminated his employment, he was not heard in self exculpation and the deliberations were about renewal or rejection of renewal but culminated in his termination. It was not disputed that the claimant had written 6 months prior to lapsing of the last 3 year contract as required in seeking the renewal of the contract and it was his case that he was not given chance to defend his performance in view of his request for renewal.

The claimant further testified that he learned about his dismissal on the morning of 27.06.2014 long

before he received the termination letter later that day at 3.30pm. That morning the claimant testified that his friend being CW visited the claimant's home and showed the claimant page 55 of the Standard Newspaper which published the claimant's portrait and with the communication thus, **"Take notice that Mr. John Kipkemoi Cheruiyot whose photo appears here is no longer an employee of Nakuru Water and Sanitation Service Company Limited (NAWASSCO). He is therefore not authorized to act for or on behalf of NAWASSCO LTD in any capacity. NAWASSCO will not be liable to any person or organization for any loss or damage incurred or suffered as a result of dealing with him."**

The same notice was subsequently published by the respondent in the Daily Nation and the Star of 30.06.2014. The claimant testified that when he read the notice he felt bad because his character had been demeaned or assassinated and he had been portrayed as a bad person. For example, CW had asked him whether he had misappropriated funds. He was telephoned by several persons about the notice compelling him to shut down his cell phone. CW testified that he thought the claimant had misused office for personal gain. CW further testified that the notice did not say that the claimant had stolen or engaged in any other misconduct. CW further testified that it was his thinking that the claimant had engaged in fraud but the content of the notice did not state that the claimant had engaged in fraud. The claimant prayed for damages for defamation.

RW testified that the claimant committed all the things as leveled against him in the termination letter and at no time, including in the proceedings before the court, did the claimant deny committing any of the things the board found to be offensive. In the taxation cases, RW testified that perusal of the relevant court files showed that there was no representation for the respondent's interests. The termination letter had been delivered to the claimant by email and physical delivery on 26.06.2014. RW further testified that the press notices were useful public communication to protect the respondent's interests and were not malicious or defamatory. RW stated that the claimant applied for renewal on 21.01.2014; the board 1<sup>st</sup> met on 13.06.2014 when the application was tabled; the resolution was on 26.06.2014 when the claimant's performance was already questionable and wanting; and termination followed. RW further stated that the claimant had only 24 or 25 days of service before lapsing of his 3 years' term of service; the claimant was telephoned by the respondent's chairman to attend the meeting of 26.06.2014 but did not comply because he did not recognize the board; and the claimant's case was unjustified as the court should dismiss it with costs.

The issues for determination are as follows:

1. Whether the reasons for the termination were valid.
2. Whether the procedure invoked during the termination was valid or legitimate.
3. Whether the claimant could serve as managing director while he was on leave.
4. Whether parties are entitled to the remedies as prayed for.

The **1<sup>st</sup> issue** is whether the reasons for the termination were valid. First the claimant has admitted that he engaged in all the activities as set out in the termination letter. Secondly, clause 2 of the contract on reporting provided that the claimant was responsible to the respondent's board of directors and clause 3 on duties and responsibilities required the claimant to implement the board's decisions in a results oriented and timely manner to achieve the company's goals, objectives and agreed performance targets. In all the activities the claimant engaged in and as set out in the termination letter, there is no doubt that the claimant acted free of the board's decisions and the court finds that the claimant in undertaking the activities acted in contravention of the contract of service which obligated him to implement the board's decisions. Thirdly, the court has carefully considered the termination letter. The court finds that the respondent's board considered the claimant's request for renewal dated 21.01.2014; it assessed that request against the claimant's conduct which disclosed performance that breached the cited provisions of the contract that the claimant had, in the findings of the court, contravened; and the board accordingly, as conveyed in the termination letter, declined to renew the claimant's contract due to the cited reasons. The court finds that the contract terminated by lapsing of the 3 years as agreed within a framework whereby the claimant would be paid up to 21.07.2014, the last day of the 3 years term of service. The court finds that the reason for termination was lapsing of the 3years and based on the respondent's rejection of the claimant's application for renewal the respondent having taken into account the claimant's performance

as set out in the contract. The reason for termination was in accordance with the contract and therefore valid.

The **2<sup>nd</sup> issue** for determination is whether the procedure invoked during the termination was valid or legitimate. The court has found that the procedure entailed consideration of the contractual clause on renewal and the procedure was therefore legitimate.

The **3<sup>rd</sup> issue** for determination is whether the claimant could serve as managing director while he was on leave. The court has found that the claimant was contractually obligated to act in accordance with the board's decisions. The claimant's actions to purport to work while he was on leave were obviously in contravention of the board's decision that the claimant remains on leave. The claimant urged that the board might not have been properly constituted. Nevertheless, the claimant never questioned the composition when the decision to proceed on leave was made; he condoned any defect that might have existed in the board's composition; and in the opinion of the court, the claimant was bound by the decisions of the board whose minutes are on record and have not been shown to have been set aside in any legitimate process.

The **4<sup>th</sup> issue** for determination is whether the parties are entitled to the remedies as prayed for. The court makes findings as follows:

1. The court has found that the claimant's termination was in accordance with the renewal clause, the reason was valid and therefore the court finds that the termination was not unfair or unlawful. Prayers (a), (b), and (c) in the memorandum of claim will therefore fail especially that the respondent undertook to pay the claimant until the last date of the 3 years' service.
2. The claimant has prayed for damages for defamation. The first consideration is whether the publication as made constituted defamatory content. The court has considered the content and finds that the notice as published simply conveyed that the claimant was no longer in the respondent's employment. It was unfounded for the claimant, CW and others who telephoned the claimant to have read much more and conceived beyond the content as published. It is the content that was published that mattered and not the perceptions and conceptions that were unreasonably inferred by some of the readers. Accordingly, the court finds that the prayer shall fail.
3. The respondent, in the findings of the court, did not establish that the claimant had failed to instruct an advocate to appear in the taxation proceedings in the alleged cases. The claimant's evidence was that Githui & Company Advocates had been instructed to appear in the relevant cases. There is no ground to doubt the claimant's evidence and no respondent's financial loss attributable to the claimant has been established as alleged in the counterclaim. Thus, the court finds that the counterclaim will fail.

In conclusion, judgment is entered for dismissal of the memorandum of claim and the counterclaim with orders that each party shall bear own costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 17<sup>th</sup> October, 2014**.

**BYRAM ONGAYA**

**JUDGE**