



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO.1089 OF 2011

(Before D.K.N Marete)

GEORGE KINGORI GATHOGO.....CLAIMANT

Versus

KENPIPE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY.....RESPONDENT

JUDGEMENT

This matter was a chequered and interesting history. It was originated in the High Court vide a plaint dated 7th January, 2008 and filed on 22nd instant. Here, the Plaintiff prays for;

- a. *Kshs. 10,960,145 plus interest from 17/9/2007 till payment in full*
- b. *General damages*
- c. *Costs of this suit*
- d. *Interest on (b) and (c) above*
- e. *Any other relief*

This matter was originated vide a plaint dated 7th January, 2008 and filed at the High Court on 22nd instant. It was a claim for damages for unfair termination of employment to the tune of Kshs.10,960.00 and including general damages, costs and interest.

The defendant vide a statement of defence dated 14th February, 2008 denied the claim and prayed that the same be dismissed with costs. She also raised a counter-claim to the tune of Kshs. 1,937,192.80 with interest at 13.8% from 1st February, 2008 and costs. The defendant thereafter filed an ammended defense ammended on 21st July, 2018 where she clearly reiterated and set out the defence as earlier drawn.

The matter took its course and was heard and finally determined vide a considered judgment of court delivered on 26th February, 2011. This was in favour of the claimant.

The respondent as a consequence of the abovesaid judgement thereof filed an application by way of chamber summons dated 11th March, 2010 as follows;

1. *THAT this application be certified as urgent, service thereof be dispensed with, and the same be heard ex parte in the first instance.*
2. *THAT this Honourable Court be pleased to issue and order to stay of execution of the judgment entered against the Defendant/applicant on 26/02/2010, any resultant decree from the said judgment as well as all other consequential orders issued herein pending the hearing and determination of this application inter parties.*
3. *THAT this Honourable Court be pleased to set aside all the proceedings relating to the hearing, submissions, judgment, resultant decree from the said judgment, and all other consequential orders issued herein.*
4. *THAT this Honourable Court be pleased to order that the manner in which this case was fixed for hearing, the conduct of the hearing and subsequent proceedings was improper, unprocedural and/or was in flagrant violation of the provisions of the Civil Procedure Rules as well as the general practice directions governing the conduct of matters at the High Court of Kenya.*
5. *THAT the costs of this application be provided for.*

On 26th May 2010, by consent of the parties this application was allowed as prayed thereby setting out the matter for a *de novo* hearing.

The matter was to re-appear for hearing at some unclear date when it was set for filing of further documents and subsequent hearing on 15th June, 2011. On this date, and with the agreement of the parties, the matter was transferred to this court for hearing and determination. These orders were made in tandem with the provisions of the Constitution of Kenya, 2010 relating to employment and labour relations disputes dispensation and settlement.

On 2nd March 2012, Mukunya, J. (as he then was) ordered for a re-start of the entire process by re-opening pleadings to suit the format of this court and therefore the references to a statement of claim and consequential response as earlier set out.

The claimant's case as set out in the Claimant's Statement of Claim is that he was employed by the respondent as an Accounts Officer vide a letter of offer and acceptance dated 1st October, 1993. The claimant's further case is that he worked diligently from the date of appointment and was upgraded to the position of Manager by the time his services were unlawfully and wrongfully terminated by the respondent on 17th September, 2007.

The claimant outlines the backgrounds of his employment and case as follows;

- *Vide a letter of offer and acceptance of employment dated 1st October, 1993. He was employed by the respondent as an Accounts Officer on terms of a three (3) year renewable contract that entitled him to a gratuity on completion of such contract period.*
- *He worked for six (6) months and vide a letter dated 15th May, 1994 the contract was confirmed with the same terms and further terms as follows;*
 - i. *Joining the respondent's gratuity scheme*
 - ii. *Three months notice shall be required by either party to terminate contract.*
 - iii. *On grounds other than gross misconduct, the claimant was entitled to service pay calculated at three (3) months current basic pay for every year worked shall be payable.*
- *On 24th June, 2007 his position was upgraded again on the following improved terms*

- i. *Salary scale of Kshs.44,988 x 1390-47768-1410-51998 x1566-55130 per month.*
- ii. *Fuel allowance Kshs. 43,040*
- iii. *House allowance Kshs. 35,000*
- iv. *Leave allowance Kshs. 43,000*

The claim further avers and submits that on 4th April, 2007 he received a letter from his employer requiring him to go on compulsory/ forced leave on grounds of irregular payments relating to the respondents co-operative bank account. The claimant then proceeded on leave. While on his leave, he was summoned to a disciplinary committee meeting on 14th April, 2007 at the respondents offices. This committee found him faultless on the allegations of wrong doing.

Despite the outcome of the disciplinary process as above, the claimant was nevertheless suspended from employment vide a letter dated 2nd July, 2007. By a letter dated 1st August, 2007 the respondent lifted the suspension and requested the claimant to report back to work on 6th August, 2007 and on such reporting back, the respondent directed him to proceed on twenty (20) days annual leave which the claimant did.

It was while on this annual leave that the claimant received the respondents letter dated 8th August, 2007 informing him of the commencement of a restructuring programme and requiring him to apply for any new position under the new terms and also that he would be subjected to interviews with the new applicants. The letter also advised the claimant that he would be paid all his dues under the existing contract. The claimant for various reasons did not apply for the new positions.

On 17th September, 2002 a day before the expiry of his forced leave he received a letter of the same date terminating his services with an offer for payment of the following dues;

- i. *1 month salary in lieu of notice*
- ii. *Accrued gratuity*
- iii. *The balance of emoluments*

The claimant submits that the termination of service was malicious, unlawful, unilateral, injurious, punitive and in bad faith as follows;

1. *Was sent on forced leave to give way for investigations which exonerated him.*
2. *Despite being exonerated was suspended.*
3. *During suspension I was recalled after the Bank fully compensated for respondent.*
4. *When he reported for duty, he was directed to apply for annual leave.*
5. *While on leave, I was directed to apply for a new position while his contract was still in force.*
6. *One day before resuming from annual leave his services were terminated.*
7. *The termination was not due to any misconduct on his part.*
- viii. *He was not given any notice before termination.*
9. *The authority/power to hire and fire staff by the respondent vests in central management committee which had not met to make a resolution to terminate his services.*

10. The decision to terminate his services was unilateral and irregular and the claimant claim for exemplary, punitive and general damages.

He prays for;

a) Three months salary in lieu of notice	515,496.00
b) Days worked for but not paid	859,160.00
c) Leave earned but not utilized (206) days @ 1.5rate	1,769,869.00
d) Gratuity	784,708.00
e) Severance pay for 14 years	3,687,264.00
f) Personal savings (shares)	772,000.00
TOTAL	8,388,497.00
g) General damages for breach of contract	
h) Punitive, exemplary and aggravated damages	
i) costs of this suit	
j) Interests on (b), (c) (d) and (e) above and court rates	
k) Any such other relief or further relief as this honourable court may deem fit and just to grant	

The respondent by a memorandum of reply dated 14th April, 2012 denies the claim and prays that the same be dismissed with costs. She is however agreeable to a payment of Kshs.205,471.98 as computed by herself and on the basis of the claimant's salaries for the months of January, February and March 2007.

The defence is outlined as here under;

- *The respondent agrees on the particulars of the employment of the claimant including the rise to the position of Manager and also that this was a three (3) year contract where he would be entitled to 25% of his three year basic salary of such completion.*
- *She also admits a confirmation of the employment on 13th May, 1994 but cautious that the letter prescribed a termination period of by either party giving three months notice on three months salary in lieu thereof.*
- *Gratuity was paid on such periods without a formal renewal of the contract.*
- *Between January and April, 2007, the period preceding the respondents annual delegates meeting (ADM) the respondent noted irregular withdrawals from the account with the co-operative bank of Kenya and upon further enquiry it emerged that despite the looming ADM, and the attendant need to have financial records ready for audit, the sacco's annual report was far from ready as a consequence of basic tasks like bank reconciliations having not been undertaken. These were the responsibility of the claimant. It was thereafter noted that the claimant was not performing his duties appropriately and therefore the decision to suspend him and pave way for forensic audit and investigation.*

The respondent, with a view aligning the sacco's terms of service for its employees and those of other

sacco's went out to restructure its operations and undertook such restructuring and urged the claimant to apply for any suitable vacancies in the restructured establishment as advertised 13th August, 2007 through the resource and consultancy department of Kenya Union of Savings and Credit Cooperatives (KUSCCO). The claimant did not heed the call.

The recruitment process was concluded by mid-September, 2007 and on 17th instant, the respondent issued a letter terminating the claimant's services on terms as set out earlier by the said claimant. It is the respondent case that the claimant had been paid all his previous payments for gratuity.

The respondent denies the claimant's claim for leave due and submits that the claimant took all leave due during the pendency and term of his contract. She contends that this is a complete forgery and brings out the true picture of the leave scenario vide a copy of a document annexed by herself. The respondent also denies the claimant's claim for damages in that this contract was always terminable on terms set out in the contract and without assigning any reasons. The claim for damages for breach of contract therefore falters and fails.

The respondent further faults and rubbishes the claimant's claim for gratuity for three years and severance pay as not tenable in that the claimant's contracts were for three years each, renewable and to stretch the claim for fourteen (14) years is tantamount to unjust enrichment and therefore unlawful. It is not payable or at all.

Further, the claimant's shareholding in the Sacco, admitted and amounting to Ksh.781,000.00 is greatly outweighed by his liability standing at Kshs.1,937,192.80 being the entire outstanding loan recovered from his guarantors. The respondent therefore admits liability to the tune of Kshs.205,471.98 due and payable to the claimant after recovery of all his liabilities with herself. She prays for costs in the circumstances of this badly thought out claim.

The claimant testified in evidence at the hearing on 13th June, 2013 and cleared his testimony on cross-examination and re-examination on 20th January, 2014. He in essence reiterated his case as brought out in his pleadings. He was however, hazy on cross-examination on the issue of the development of a strategic plan and restructuring of the respondent Sacco. He denied knowledge only to testify that this was done during his leave and the respondent did not inform him of the available vacancies.

The defence brought in DW1, Joyce Mutungi, the chairperson of the respondent sacco as witness. She testified in reiteration of the respondent's pleading and case and particularly that there was some wrong doing on the part of the claimant but this was not considered. She also laid emphasis on exhibit 8 on restructuring and posits that this was public knowledge but the claimant was informed and given the choice of applying. She further testified that the claimant's terminal dues were computed but not paid to date. On cross-examination she testified that the claimant's dues only arise from his last contract effective from October, 2005 to the date of termination of employment in September, 2007 and nothing is owed from the previous contracts. A formal notice of termination was issued in the circumstances. She testified that the claimant is only entitled to

1. *Salary between suspension and termination.*
2. *Notice pay*
3. *Gratuity for period worked*
4. *Shares Kshs.781,000.00,*

but this must be off-set from his liability of Kshs.1,937,192.80 and Kshs.215,471.98 being outstanding sacco loan and loan for fridge and cooker.

DW2, Shadrack Oteng Ouma testified that he has been a worker with the Kenya Pipeline Company since 2000. He testified on the claimant's leave position and posited that as officer in charge and having

managed the claimant's leave, none was outstanding.

The hearing was concluded on 17th February, 2014 when the parties agreed on a disposal of the same by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. I have had occasion to walk through the pleadings, testimonies and written submission of the parties. These largely tally and are not dispute by the parties, or at all. This court therefore is duty bound to establish the veracity of the termination vis-a-vis the available data and evidence of the parties and came up with a conclusion as to whether this is appreciable or not appreciable in law. The respective positions of the parties are clear but contrasted. This is normal under these circumstances.

Three episodes are clearly established and agreeable from the parties' evidence, the suspension of the employment service of the claimant, the information on restructuring and advise to the claimant to apply for any suitable position in the restructured establishment and finally the ultimate termination of the claimant's contract on employment. Do these pose a breach of process and law on the subject? Are these unlawful?

It is not in dispute that the suspension and termination of the claimant was made due to some flaws in the performance of his office. Some critical accounts processes were not accomplished even at a critical period of the incoming Annual Delegates Meeting. The respondent's auditors raised issues of laxity and poor performance on the part of the claimant and this is brought out in evidence by the respondent. The claimant does not adduce any evidence to rebut this. His is mere denial. The respondent, however, submits that this was not taken into consideration in the termination of employment of the claimant.

The claimant admits that while he was on the so called forced leave he was informed of the restructuring process of the respondent and advised to apply for any suitable position in the new establishment. For reasons adduced in evidence, he did not apply for any position and was thereafter relieved of his employment. The reasons for his none application for a vacancy in the new establishment are not convincing, or at all.

The claimant has not proven a case of wrongful, unfair and unlawful termination of employment on a balance of probabilities. On a preponderance of evidence, this matter tilts in favour of the respondent and I so find. I therefore find and conclude that the termination of the employment of the claimant was trite and lawful in the circumstances.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. The claimant has failed on the foremost and critical aspect of the fallibility of the termination of his employment. He would therefore not succeed on the limb of relief. From the onset, this claim is denied by the respondent. Secondly, the respondent admits the just dues to the claimant and tabulated in an annexure to Memorandum of Defence dubbed *summons working of what Kenpipe Sacco owes George Kingori Gathogo*. She comes out with a figure of Kshs.205,471.98 being net dues from of all liabilities owed to the claimant. The claimant should contend with this.

As to the third issue for determination, costs go to the respondent. The claimant cannot be allowed to take the whole world on wondering spree at it's costs. I therefore dismiss this claim and order as follows;

1. That the respondent be and is hereby ordered to meet and pay the admitted amount of Kshs. 205,471.98 to the claimant within thirty (30) days of this order of court.

2. That the costs of this cause shall be borne by the claimant.

Delivered, dated and signed this 5th day of December 2014.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Isoe instructed by C. K. Dori & Co. Associates Advocates for the claimant
2. Mr. Simiyu instructed by Wekesa Simiyu Advocates for the respondent