



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 583 of 2011

ENG. DAVID MUTEGI NJUE.....CLAIMANT

VS

TANATHI WATER SERVICES BOARD.....1ST RESPONDENT

NOL-TURESH PIPELINE BULK WATER

SUPPLY COMPANY LTD..... 2ND RESPONDENT

Mr. Wilfred Nyamu for the Claimant

No appearance for the Respondent

AWARD

The Memorandum of Claim dated 7th April, 2011 was filed by the Claimant on 14th April, 2011.

The particulars of the Claim are that the Claimant was employed by the 1st Respondent Tanathi Water Services Board by a letter dated 3rd August 2010, to commence work with effect from 1st September 2010. He was placed on six (6) months probationary period. He was then seconded in the same letter of appointment to serve the 2nd Respondent Nol-Turesh Pipeline Bulk Water Supply Company Ltd as its Managing Director from the said date of appointment.

In terms thereof he was to report to the Board of the 2nd Respondent and to provide leadership to the Company to achieve its objectives, prosperity and sustainability among other responsibilities listed in the said letter of appointment. The letter was attached as Appendix 1 to the Memorandum of Claim.

His monthly terms of employment were as follows:-

(a) Basic salary	-	Kshs.102,000
(b) House Allowance	-	Kshs. 20,000
(c) Out patient medical allowance	-	Kshs. 4,000
(d) Commuter allowance	-	Kshs. 5,000
(e) Mobile Airtime Allowance	-	<u>Kshs. 4,000</u>
TOTAL	=	<u>Kshs.135,000</u>

The Claimant was also entitled to 30 days annual leave with leave allowance at the rate of one third of his salary or Kshs.50,000 whichever was less. The contract could be terminated by either party by serving one month's notice on either party or by paying one month's salary in lieu of notice.

On 11th October 2010, the Claimant received an offer of employment by IGIP Africa – Tertiary Consulting Engineers Ltd who offered him better terms than the 1st Respondent, upon which he approached the 1st Respondent to renegotiate his package to avoid movement to greener pastures.

The Board of the 1st Respondent met on 18th October 2010 and reviewed his basic salary to Kshs.300,000 with a promise to increase the same to Kshs.350,000 in future when the financial status of the Respondent improved. The minutes of the Board are attached as Appendix 3.

The Respondents however did not honour the increment at the end of the month as its bottomline was still poor. Consequently, the Respondents owed him Kshs.700,000 in salary arrears which he now claims.

On 23rd February 2011, the Employment of the claimant was terminated by a letter dated 22nd February, 2011 written by the Ag. Chief Executive Officer of the 1st Respondent.

The reason given for termination in the letter was that he had failed to provide leadership to the 2nd Respondent to achieve objectives, prosperity and efficiency in the provision of water services. As a result, the Company had failed to supply water in the areas it was mandated to and was unable to generate income to pay salaries regularly.

The letter went on to inform him that as a result, "*the Board has decided to terminate your employment with effect from 23rd February, 2011*". He was offered one month's salary in Lieu of Notice. At the time he had served for five (5) months.

He claims that the termination of his employment was unlawful and unfair and prays for twelve (12) months' salary as compensation for the termination. In addition, he seeks General Damages for breach of contract based on loss of expected earnings for the remaining years of retirement; costs of the case and any other relief as the court may deem fit.

The Respondent filed a reply to the Claim on the 7th June 2011, and denied the particulars of the claim aforesaid.

The Respondents aver that the employment of the Claimant was terminated for reasons of poor leadership leading to failure by the 2nd Respondent to achieve its objectives and was headed for financial ruin in that it could not pay staff salaries. Further they state that the Claimant was subject to due process in line with the Respondent's Code of Regulations, the labour laws and State Corporations' Act.

The Respondent avers further that the Claimant forfeited his benefits by fact of the termination except for the salary for days worked. They also dispute the computation of the salary arrears claimed by

the Claimant. Furthermore, the Claimant had failed to comply with the Corporation's clearance requirement as he was invited to do in the letter of termination hence his dues were not assessed.

The Respondents aver further that the Claimant did not serve them with a letter of demand and the claim is statute barred, bad-in-law and therefore, fatally defective. The response to the claim was filed by Ngulli & Company Advocates.

The matter was first allocated a hearing date by Justice Kosgei in open court in the absence of the Respondent. The matter came before Justice Rika for the hearing on 23rd July, 2012 but did not proceed due to the absence of the Respondents. The matter was allocated a fresh hearing date on 19th September 2012, and the Claimant was directed to serve the Respondents with the hearing Notice.

On the 19th September 2012, the matter came for hearing as scheduled before Justice Radido when Mr. Nyamu Adovcate appeared for the Claimant and Mr. Kibanya Advocate appeared for Mr. Nguli for the Respondents. Mr. Kibanya told the Court that he only had instructions to seek a postponement and was therefore, not ready to proceed with the matter.

The matter was adjourned to 27th November 2012 for hearing and the Respondents were granted leave to file further documents within fourteen (14) days upon request by Mr. Kibanya.

On 27th November, 2012 the matter was listed in the Cause List before my court and the Respondent did not appear. I ordered the matter to proceed to formal proof in default of appearance.

Consequently, the Respondent did not offer any oral evidence in support of its case and no documentary evidence was attached to its statement of Response. Its case by and large therefore amounts to bare denial as contained in the Statement of Response.

The Claimant testified under oath in support of its case. He told the Court that from the time he took up employment with the 2nd Respondent, the delivery of water services had gradually improved and so was the financial status of the Company. He was therefore achieving his mandate as per the letter of appointment. He said by December, 2010 the Company had improved its financial turnover from Kshs.3million to 5 million but the workers were generally demotivated due to non-payment of their salaries regularly. The termination he said was a rude shock to him since the Respondents had persuaded him not to take up an offer of employment on better terms with IGIP Africa as demonstrated in Appendix 2 to the Claim dated 11th October, 2010.

From the evidence tendered by the Claimant himself, he was still serving probation of six (6) months at the time of termination.

Section 42(2) of the Employment Act No.11 of 2007 provides:-

“2 – a probationary period shall not be more than six (6) months but it may be extended for a further period of not more than six (6) months with the agreement of the employee”.

Furthermore, Section 41(1) provides:-

“subject to Section 42(1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop-floor union representative of his choice present during this explanation.”

It is therefore clear that the Claimant was not entitled to the protection under Section 41(1) above and it follows also therefore, the employer need not prove the reason for terminating an employee on probation was valid and same was done in accordance with a fair procedure in terms of Section 45(2)(a)

and (c). The rationale for this is that probation means “*the process of testing or observing the character or abilities of a person who is new to a role or job*”, per Concise Oxford English Dictionary, 2011 Edition.

This means during this period, each party is free to terminate the relationship at will and in the case of the Contract of the Claimant, this was subject to provision of one month’s notice or payment of one month’s salary in lieu thereof. The Court therefore, finds that the Claimant is entitled to one month’s Gross Salary at the time of the termination in Lieu of Notice.

The Respondent did not dispute that the Claimant did not receive full salary for the period worked. Infact, the Respondent averred that it did not compute the salary owed to him for days worked because he had not made Clearance upon termination as required. The Claimant has claimed Kshs.700,000 being unpaid salary arrears and the court finds that this claim has been proved on a balance of probabilities.

Accordingly, the court awards the Claimant:-

- (a) **Kshs.300,000 being one month’s salary in Lieu of Notice; and**
- (b) **Kshs.700,000 being unpaid salary arrears -**
Total - Kshs.1,000,000/=.
- (c) **Interest at court rates from the date of filing the suit to the date of payment.**
- (d) **Costs of the suit.**

It is so ordered.

DATED and DELIVERED at Nairobi this 5th day of January, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE