



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 785 of 2010

MOSES KIPLAGAT CHANGWONY.....CLAIMANT

VERSUS

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY.....RESPONDENT

Mr. Songole for the Claimant

Mr. Wanga for the Respondent

AWARD

The Memorandum of Claim dated 9th July 2010 was filed before this court on the same date seeking;

- (a) a declaration that the claimant was unlawfully dismissed from his employment/or and was constructively dismissed;
- (b) Reinstatement of the Claimant to his post as Managing Director without loss of salaries, allowances and other benefits from the date of suspension to be ascertained by the court;
- (c) In the alternative, judgment against the Respondent in the sum of Kshs.9,720,000 being salary and allowances, entitlements to the Claimant for three years;
- (d) Gratuity entitlement for six (6) years at the rate of 31% per every year worked being Kshs.3,013,200/=;
- (e) Interest on items (c) and (d) above at court rates;
- (f) Costs of the suit;
- (g) Damages;
- (h) Any other relief as the court deems fit.

The claim is supported by the verifying affidavit of the Claimant and Annexures 1 to 13 attached to the Memorandum of Claim.

The Respondent filed a memorandum of defence dated 24th August 2010 and filed on 30th August,

2010. The same has appendices 1 to 3. On 14th April 2011, the Claimant filed a reply to the Respondent's memorandum of defence on 12th October 2010 subsequent to which the Respondent filed a supplementary bundle of documents on 21st March 2011 and list of authorities on 28th September, 2011. These documents were filed with the leave of court.

The parties herein agreed to dispense with the oral evidence and the matter to proceed by way of documents on record and submissions to the court. This was per the order of Hon. Justice Chemmutut of 15th April, 2011.

On 26th October 2012, the parties appeared before the newly constituted Industrial Court when they agreed the claim to proceed on the basis of fresh written submissions. The Claimant filed written submissions on 6th November, 2012 and the Respondent filed on 7th December, 2012 and the matter was mentioned before me subsequently when the parties agreed that I should proceed to write judgment on the basis of the pleadings and written submissions.

Claimant's Case

The claimant's case maybe briefly summarized as follows;

That the claimant was employed by the Respondent in the year 1987 in the position of Administrative Stores Officer and Logistics Support Manager. He voluntarily resigned in 1994 to pursue alternative employment. On 14th November 2002, he was re-appointed by the Respondent as the Managing Director for a period of three (3) years. Upon expiry of the initial term of contract, the same was extended for a further term of three (3) years effective 15th November, 2005.

On 14th February 2006, following an extra ordinary meeting of the Board of Directors, the Claimant was suspended from duty and was thereafter charged before the Anti Corruption Court for abuse of office and conspiracy to defraud. He was subsequently acquitted of the charge for lack of sufficient evidence. Upon acquittal, he wrote to the respondent demanding payment of his final dues and benefits. The respondent did not respond to his demand hence the filing of this suit. The Claimant has submitted as part of his evidence, the contracts of appointment and renewal and the requisite gazette notices and the extracts of the Board Meetings where the matter was discussed and resolutions made.

He claims that the Board had exonerated him from any wrong doing but proceeded to suspend him notwithstanding. That the suspension was done verbally by the Chairman of the Board, Mr. Alex Mureithi on 3rd February 2006 allegedly on the strength of a resolution of the Board of 26th February 2006 marked appendix "mck7". The suspension was reduced into writing on 14th February 2006 which is appendix "mck9".

The Respondent is a creature of statute and the Claimant was appointed in terms of Section 10 of the Tana and Athi River Development Authority, Cap.443, the State Corporations Act, Cap.446 and guidelines as contained in various Office of the President's circulars including Nos.1/87 of 12/7/87 and Op.9/21/2A of 23/10/2002. The appointment and extension of the Contract aforesaid were made by the Permanent Secretary on behalf of the Minister.

The Claimant's monthly remuneration in the position of Managing Director with effect from 1st July 2005 was Kshs.270,000 made up as follows;

- (a) Basic Salary - Kshs.170,000
- (b) House Allowance - Kshs. 60,000
- (c) Other Allowances - Kshs. 40,000

These are confirmed by annex “mkc5” dated 24th June 2005.

It is noteworthy that the letter of suspension enumerated the reason for the suspension to be “impropriety, corruption, abuse of office and other irregularities, which have been brought to the attention of the Board”.

The suspension also followed a refusal by the Claimant to take voluntary leave pending investigations of the matter. The suspension was for two months (60 days).

At all material times, the Claimant’s terms and conditions of service were governed by the TARDA Employee Staff Manual Code of Regulations, and the National statutory laws of employment.

In paragraph 8 of the Statement of Claim, the Claimant states that he had rendered dedicated service characterized by hardwork and fidelity. That when he assumed the leadership of the Respondent, it was on the verge of collapse but was able to turn around the Respondent’s fortunes and was recognized for his efforts by receiving a Presidential Award, MBS. He outlined milestones 8(a) – (h), therein which were the hall mark of his achievements. He attributes the extension of his contract to these achievements.

However, in the year 2006, the Respondent’s Chairman, the late Mr. Alex Muriithi started interfering with the day to day, running of the Respondent’s operations contrary to the regulations governing the management and the administration of the affairs of the Respondent. According to the Claimant, the unlawfully assumed ‘executive powers’ and began giving instructions to the staff to perform certain duties without reference to him as the Managing Director or the Board of Directors, but through a sub-committee. He even addressed correspondence to those parties. He set up an audit Monitoring and Evaluation Committee without reference to him. The Committee operated unprocedurally and its line of inquiry indicated that it was out to get the Claimant by hook or crook with a view to get him removed from office.

This led to the unprocedural calling of the extra-ordinary Board meeting by telephone on 26th January 2006 in which the Audit Committee brought up for discussion a list of alleged misdeeds by the Claimant without prior notice or warning to the Claimant. The Claimant was nevertheless asked to respond to two issues namely;

- (a) the alleged sale of the Respondent’s plot at Upper Hill, Nairobi and;
- (b) improper purchase of the MD’s official Mercedes Benz vehicle;

The Claimant denied the claims and asked for time to prepare his full defence to the allegations. The meeting directed the committee to carry out further investigations and the Chairman was asked to write to Kenya Anti Corruption Commission (KACC) to request it to conduct investigations on the said allegations. The minutes of the meeting were submitted as Appendices ‘mkc6’.

The claimant states that the said meeting was irregular in that, no notice had been given to the Board members that these matters were to be the subject of the extra-ordinary meeting. The Claimant himself had not notice that he would be the subject of discussion therein. The decision made therein to discuss, suspend and lastly bring criminal charges against the Claimant were unprocedural and contrary to the laws governing the operations of the Respondents.

The decisions were made contrary to the rules of natural justice and fairness. The Claimant states that he was accordingly condemned unheard and the decision was based on unsubstantiated allegations to his loss and detriment, hence on 3rd February 2006, when the Chairman summoned him and asked him to proceed on compulsory leave to pave way for investigations, he declined and wrote a protest letter dated 8th February 2006 to the Chairman. The same is appendice ‘mkc7’ to the claim. The Chairman replied to the letter on 14th February 2006 attached and marked ‘mkc8’.

An extra-ordinary Board Meeting held on 14th February 2006 made a decision to suspend the Claimant without giving him a hearing. The letter of suspension is marked 'mkc9'. The Claimant asserts that the suspension was illegal and null and void because it is only the Minister for Regional Development who was the appointing authority who could suspend him on advice of the Board.

The Claimant added that the investigations by KACC nevertheless proceeded, and the Commission exonerated him from any wrong-doing. The Claimant also met the Board Audit Committee and demonstrated that the allegations of the sale of Respondent's plot and irregular purchase of the MD's Mercedes Benz Vehicle was baseless. The reports prepared by the Respondent are attached as appendices 'mkc 10' and 'mkc 11'.

The Chairman went ahead however to write to the Director of CID recommending that the Claimant be charged subsequent to which the claimant was charged in Nairobi Anti-Corruption Court, Criminal Case No.2273 of 2006, Republic –Vs- Moses Kiplagat Changwony. He was eventually acquitted under Section 210 of the Criminal Procedure Code. The judgment is attached and marked 'mkc 12'.

During the period of suspension, the Respondent did not pay any salary or part of it or any allowance contrary to the staff manual. It also refused to pay rent for the house occupied by the claimant.

The claimant states that these measures were punitive, malicious and meant to subject him to hardship, financial embarrassment and ridicule.

The decision to suspend the claimant without pay was contrary to the provisions of Section 63 of the Anti-Corruption and Economic Crime Act, the Claimant added. The suspension meant to be for two months, till 14th April, 2006 turned out to be indefinite and the claimant wrote to the Respondent on 25th April, 2006 pleading for payment of rent and other allowances.

On 17th May, 2006 the Chairman responded stating that same would only be paid after the rescission of the suspension. The two letters are marked 'mkc 13' and 'mkc 14', respectively.

The Claimant states that the suspension without pay was not genuine but was meant to inflict hardship on him with a view to force him to resign. The Claimant was threatened with eviction by his landlord and he could not afford to meet the basic necessities for himself and his family as a result the claimant was compelled to tender his Letter of resignation so as that he would secure alternative employment. He claims that he was constructively dismissed taking into consideration the circumstances of the case.

It is the further contention by the Claimant that the constructive dismissal was unlawful and unfair and is entitled to damages and compensation as a result thereof.

The claimant made a demand notice of intention to sue but the Respondent ignored the same. The claimant therefore, seeks judgment against the Respondent for;

- (a) declaration that the claimant was unlawfully and unfairly, constructively dismissed from employment;
- (b) Reinstatement of the Claimant to his post of Managing Director without loss of salaries, allowances and other benefits 'from the date of suspension';

In the alternative

- (c) Judgment against the Respondent in the sum of Kshs.9,720,000/= being salary and allowances, entitlements to the claimant for three years.
- (d) Gratuity entitlement for six (6) years at the rate of 31% per every year worked being

Kshs.3,013,200/=.

- (e) Interest on (c) and (d) above at court rates.
- (f) Costs of the suit.
- (g) Damages.
- (h) Any other relief the court may deem fit.

The claim is supported by the verifying affidavit of the Claimant and numerous attachments marked 'mkc 1' to 'mkc 14' referred to above.

The Respondent admits the particulars of employment of the Claimant by the Respondent as a Managing Director of the Authority vide a letter of appointment dated 14th November, 2002. That the said appointment was governed by the Tana and Athi River Development Authority, Cap.443, Laws of Kenya, State Corporations Act, Cap.446, Tana & Athi Rivers Development Authority code of regulations and guidelines as contained in various offices of the President's Circulars.

That the claimant being the Chief Executive Officer of the Respondent Authority was charged with the responsibility of ensuring efficient execution of

the policy and mandate of the organization and for the control and management of its day to day business.

The Respondent further admits contents of paragraphs 5 and 6 of the Memorandum of Claim with regard to the renewal of the contract for a period of three years from 15th November 2005. That with effect from 1st July 2005, the claimant's monthly emoluments was Kshs.270,000/= which include;

- (a) a basic salary of Kshs.170,000
- (b) House allowance of Kshs.60,000; and
- (c) Other allowances at Kshs.40,000/=.

The Respondent denies particulars of good service rendered by the

Claimant and outlined in paragraphs 8 and 9 of the Statement of Claim and puts the Claimant to strict proof thereof. The Respondent adds that between the financial year 2004 – 2005, investigations were carried out by the Inspectorate of State Corporations on the activities of the Claimant and in February 2006, the Board of Directors unanimously resolved to suspend the claimant from his duties pursuant to several allegations implicating the claimant which among others included;

- (i) Arbitrary signing of an agreement for the hire of authorities equipment vis a bulldozer, grader, and excavator from China Roads and Bridges Corporation at the rate of Kshs.5,000 per day instead of the rates approved by the Ministry of Public Works and Roads.
- (ii) Arbitrary directing the procurement of Mercedes Benz Vehicle model E 220 registration number KAN 665N
- (iii) Conspiring with others to defraud the Authority by directing the payment of Kshs.4,125,000 to Kingsway Motors Ltd being the purchase price for the Mercedes Benz instead of the Kshs.2,360,000/=.

That the Inspectorate of State Corporations in the year 2006 forwarded its findings to the Authority's Audit Monitoring and Evaluation Committee which findings included the following;

- (i) Irregular procurement of the Managing Director's official vehicle, Mercedes Benz 220, registration Number KAN 665N involving the then Managing Director and Mr. Bosco Cheronu who was the Logistics and Administration Manager at the time with the loss of Kshs.1,765,000/= by the Authority.
- (ii) Irregular leasing of the Authority's equipment by an agreement for the hire of authority's equipment in which the Claimant was implicated in arbitrary signing agreement to Lease the Authority's equipment at the rate of Kshs.5,000/= per day instead of the rates approved by the Ministry of Public Works and Roads.
- (iii) Irregular procurement of 100,000 eucalyptus seedlings for the year 2004/2005.
- (iv) Irregular procurement of 59,332 banana suckers in which the Claimant contrary to procurement procedure single sourced for the supply of the banana suckers worth Kshs.5,026,390/= on 40 ha. of its irrigation projects.
- (v) Irregular procurement of diesel involving the claimant and a Mr. Bosco Cheronu who was the Logistics and Administration Manager at the time.
- (vi) Irregular appointments and re-engagements by the Claimant in which the Claimant was implicated in flouting regulations of the authority by arbitrarily appointing and re-engaging officers into the Corporation.

For the above reasons the Respondent's Board of Directors vide a letter dated 14th February, 2006 through the Chairman proceeded to suspend the Claimant to allow for their investigations on the findings of the Inspectorate of State Corporations.

This was in terms of Regulation 7.13.4 of the TARDA CODE attached as Appendix 1 to the Memorandum of Response. This was meant to ensure non-interference in the ensuing investigations.

These matters were well within the claimant's knowledge as he had been called upon and indeed reported to the CID Headquarters severally to assist in the investigations, the Respondent submits.

In the circumstances, it is the Respondent's case that the suspension was done procedurally and in accordance with the provisions of the Respondent's Code of Conduct and the Laws of Kenya.

The Respondent in particular denies the allegations contained in paragraph 12 of the Memorandum of Claim that it conducted itself irregularly and/or illegally and reiterates that all the procedures, Code of Regulations, and the law were followed in disciplining the Claimant. That the activities by the Claimant had threatened the very existence of this Respondent, a Public Body and the extra-ordinary meeting was called to deal with the matter in utmost urgency while according the claimant an opportunity to be heard. Indeed, contrary to the allegations in paragraph 13 of the Memorandum of Claim, the Respondent had asked the Claimant to take leave to pave way for investigations without giving him undue hardship. It was his act of intransigence that led to the Board taking a decision to suspend him pending conclusion of the investigations of the very serious allegations.

The Respondent further denies the allegations of mistreatment made by the claimant in paragraphs 14, 15, 17 and 18 of the Memorandum of Claim and abuse of office by the Chairman of the Board in order to victimize the Claimant. The Respondent adds that it was necessary and reasonable to hold the Claimant accountable and render explanation to the cavalier going-ons in the Authority.

The Respondent further states that, the mere fact that the police found it appropriate to charge the Claimant with the criminal offence before the Anti Corruption Court in Criminal Case No.2273 of 2006 is an indication that the Respondent's Board of Director's decision of requesting the claimant to go on leave (and later to suspend him because he declined to do so), was in good faith, reasonable and founded in facts and law.

The Respondent further submits that the mere fact of acquittal did not exonerate the claimant from disciplinary procedures of the Respondent because the Respondent had its own independent disciplinary processes with standard of proof lower than that in a criminal trial. The acquittal therefore did not preclude the government Auditor/Controller General from recommending his termination.

The Respondent submits further that under the TARDA CODE, Clause 7.15.4, the suspension of the Claimant also meant loss of his salary and allowance and the withdrawal of same was not malicious and/or done at the whim of the Chairman as the Claimant would want the court to believe.

The Respondent notes that the Claimant vide a letter dated 24th July, 2006 addressed to the Minister for Regional Development Authority willfully resigned from the employ of the Respondent which decision superceded any previous decisions of the Board of Directors. The Respondent denies that the resignation of the claimant was unlawfully and maliciously induced by the Respondent and the same did not amount to constructive dismissal as alleged by the Claimant or at all. To this end, the Respondent totally denies the allegations contained in paragraphs 25, 26 and 27 of the Memorandum of Claim and in particular, the allegations of duress and unfair constructive dismissal.

Accordingly, the Respondent denies that the Claimant is entitled to any benefits and/or any of the reliefs sought in the Memorandum of Claim.

In its Response, the Respondent states that the Claimant having voluntarily resigned cannot be heard to seek reinstatement. That the claim of 9,720,000 million shillings for the unserved contract of three years is unsustainable and unknown at law so is the Gratuity Claim at the rate of 31% per every year worked for 6 years in the sum of Kshs.3,013,200. The Respondent urges the court to find that the entire claim by the Claimant is unfounded and has no merit whatsoever.

Findings of Facts

Upon a careful analysis of the papers filed of record and in particular the pleadings and the annexures thereto and the written submissions by both parties, the court has arrived at the following conclusion of fact;

1. That the Claimant was employed by the Respondent as its Chief Executive Officer with effect from 14th November 2002 for a 3 year contract.
2. That the contract was renewed for a similar period with effect from 15th November 2005.
3. That the gross salary of the Claimant during the 2nd Contract was Kshs.270,000/=, comprising of Kshs.170,000 basic pay; Kshs.60,000 house allowance; and Kshs.40,000 other allowances.
4. That on 14th July 2006, the Board of Directors resolved to suspend the Claimant pending investigations of various misconduct. That the said suspension followed a refusal by the Claimant to go on leave to give way for the investigations to be done in his absence.
5. That the Inspectorate of State Corporations, and the Board Audit Committee had initiated the investigations leading to various allegations against the Claimant.
6. That whereas it was initially meant to be for two months it took longer than that.
7. That, in the meantime, the Claimant faced immense financial hardships while on suspension because, the same was without pay and his pleas to the Board to reinstate his remuneration was declined.
8. That on 24th July 2006, the Claimant tendered his resignation as the Managing Director of the Respondent and the said resignation was accepted by the Minister responsible which decision was communicated to the Board of Directors of the Respondent via a letter dated 27th July 2006.

9. That the Claimant cited unfair treatment by the Board and its Chairman which conduct was according to him meant to force him to resign due to financial anxiety and want.

The Claimant was charged with three counts; 1 & 2 being Abuse of Office Contrary to Section 101(1) of the Penal Code while under Count 3, he was charged with the offence of Conspiracy to defraud contrary to Section 317 of the Penal Code.

Count 1, related to the hire of the authority's equipment at the rate of Kshs.5,000/= per day instead of the approved rates;

Count 2, related to the purchase of his official Mercedes Benz without approval of the Tender Board; whereas Count 3 related to the alleged fraudulent payment of Kshs.4,125,000/= to Kingsway Motors Limited for the said Mercedes Benz instead of Kshs.2,360,000/= as indicated in the notice.

From the judgment of the Court in Criminal Case No.2273 of 2006 the court has analysed the summary of the sworn statement by the Claimant in which the claimant denied having committed any of the offences he was charged with.

With regard to the hire of the Equipment from the respondent he said he was not aware of the approved rates referred to and that though he had taken advice from the Corporation's Secretary, he was not informed of such rates. That, it was not the first time the equipment in question was hired from China Road Bridge Corporation Limited by other Managing Directors at the same rates and he had just followed suit. He added that the equipment was used for the benefit of the Respondent by having 200 metres of strata road graded which led to opening up of a 5,000 hectares Farm Land for the Authority.

With regard to the purchase of the Mercedes Benz, he had explained that the purchase was approved by the Tender Committee and that the Procurement Department followed the Committee's recommendation.

With regard to the overpayment of Kshs.4,125,000 for the Mercedes Benz instead of Kshs.2,360,000, he had admitted that the payment was done to Kingsway Motors Limited as the purchase price of the motor vehicle, which was approved by the tender committee by a resolution made in a meeting held on 4th December, 2002. This particular accusation stood out in this case because, the claimant was acquitted of the charge for the failure by the prosecution to prove conspiracy to defraud beyond reasonable doubt.

In civil proceedings this threshold is much lower. No oral evidence was adduced before me other than the allegations and counter allegations contained in the pleadings and the various documentation attached to the pleadings.

The Law

In terms of Section 47(5) of the Employment Act;

“For any complaint of unfair termination of employment wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

In this particular case, the Claimant having resigned from the employ of the Respondent alleges that his employment was constructively and unlawfully terminated taking all the circumstances of this case into consideration. He cites usurping of his functions by the Chairperson and the audit committee resulting in bypassing him in various decisions while he was the Managing Director of the Company; the leveling against him of concocted and outright spurious changes for which he was eventually vindicated by a Court of Law and the prolonged suspension without pay specifically intended to force him out of his employment hence his resignation falls squarely within the meaning of constructive dismissal.

The claimant was in terms of Section 47(5) aforesaid to prove these allegations on a balance of probability whereas the Respondent bears evidential burden to show that its conduct of instituting disciplinary proceedings against the Claimant which lead to his suspension without pay was lawful substantively and procedurally in all the circumstances of the case.

“In this regard, TARDACODE” regulation 7.15 titled Disciplinary procedures and in particular regulation (e) reads;

“Notwithstanding the provisions of this sub-section any employee who misappropriates or is deemed to have misappropriated or embezzled Authority Funds deliberately, willfully or negligently authorizes, or does anything that could be construed as authority for wrongful payment out of Authority funds even though no payment is made, or puts to personal use any Authority funds without proper authority, associates with or is in association with an individual, individuals, group, company or partnership through which or whereby the Authority loses funds or any valuable asset as a result of improper documentation either by himself or the third party, or through documents submitted with fraudulent intentions, will be liable to dismissal with loss of all benefits. The Authority may however suspend the employee without pay pending investigation to establish the degree of the employee’s involvement or complicity in the offence or the outcome of any court action consequential thereto”.

Regulation (f) on the other hand reads;

“In the event no associations, connection or involvement of the employee in the offence or would be offence is established and provided that such loss or losses as the Authority may have or would have incurred is not attributable and could not be attributable to the negligence on the part of the employee in his duties and or responsibilities, the employee shall be reinstated in his employment with full pay as if he had never been suspended”.

Given the nature of the misconduct the claimant was alleged to have been involved in, the aforesaid regulations applied to him squarely. It would appear that the Board and/or the Chairman followed the correct procedure in suspending the Claimant without pay, pending the investigations of the serious misconduct the claimant is alleged to have committed.

The claimant did not await the outcome of that process, alleging that the investigations and the suspension without pay was not done in good faith and was intended to coerce him to resign from his employment and therefore the conduct by the Respondent amounted to constructive termination of his employment. He accordingly tendered the letter of resignation on 24th July 2006 and the resignation was accepted by a letter dated 27th July 2006 thereby severing his employment relationship with the Respondent.

The acquittal by the Chief Magistrate’s Court at Nairobi in Criminal Case No.2275 of 2006 on charges related to the alleged misconduct was on 30th April 2010 about four years after the Claimant had resigned from his position. He did not also wait for the internal investigations to be concluded because on 17th May 2006 the Chairman of the Board responded to his letter requesting that the Respondent pay his house rent and other allowances whilst he was in suspension pending the conclusion of the investigations.

The Chairman stated in the said letter as follows;

“upon careful review of your request and the Authority’s Staff Manual on the matter, the Board finds itself tied by the rules and therefore unable to grant the request. The Board’s decision is based on the current operative disciplinary provisions which have been employed in the past evenly to all cases relating to suspension from service at TARDA.

Please note that should your suspension be rescinded at anytime, the allowances and the salary withheld during the whole period of suspension will be restored retroactively.

We trust that the information we have given you on the said matter will suffice, awaiting the outcome of the 'investigations on your case'.

Surely this does not bring out the Chairman as one with deliberate and malicious intent to indefinitely punish the Claimant. He followed the regulations I cited earlier to the letter and appears to give the Claimant some hope that his ordeal will come to finality.

In the court's view this conduct by the Board does not support the particulars of constructive dismissal outlined by the Claimant in his Memorandum of Claim.

The Claimant has not produced any regulation of the Respondent which entitled him to payment of house rent and allowances whilst he was under suspension with respect to investigations of very serious allegations touching on misappropriation of large amounts of finances of the Respondent. Indeed his letter of April 12th 2006 did not cite any such regulation and/or law applicable to his circumstances at the time of writing the letter.

To this extend, the Respondent has amply justified the interim measures it took in order to reasonably get to the bottom of serious allegations leveled against the claimant who was the Managing Director of the Respondent, a Public Corporation. The Board owed this to itself and the Country at large.

In this regard, it is optune to note that Section 10 of the Tana and Athi Rivers Development Authority Act Cap.443 of the Laws of Kenya provide that the Managing Director is "*responsible for the execution of the Policy of the Authority and for the Control and Management of its day-to-day business and this Authority,*" includes in terms of Section;

10(a) "to control and supervise the acts of all officers and servants of the Authority in matters of executive administration and in all matters concerning the accounts and records of the Authority".

Therefore, whereas, it may be easy for the Managing Director to shift responsibility to his staff and/or procurement committee on matters to do with misappropriation of Authority funds in a criminal trial where the Standard of prove is beyond reasonable doubt, this defence does not avail him easily in a civil suit, like this one, where prove of misconduct be it criminal in nature is on a balance of probabilities for purposes of disciplinary action against him.

Section 118(3) of the State Corporations Act, Cap.443 of the Laws of Kenya allows Inspector of State Corporations or the Controller and Auditor General, to conduct investigations if they consider it desirable in any State Corporation and to report accordingly.

This was the case in this matter and this court rejects the views by the Claimant that such investigations were unlawful and or unprocedural. Indeed, this is what the doctor ordered for the Corporation which from the Audit report of the year ended 30th June 2004 was in dire financial straits where the Authority had incurred a deficit of Kshs.480,890,249 and was unable to meet its financial obligations as and when they fell due.

It should be noted that constructive dismissal occurs if an employee resigns from his job because of the employer's conduct towards him. The employee has to show;

Though there was no actual dismissal all the elements of dismissal were present in that the employer committed a serious breach of contract which forced the employee to leave his/her employment. The employee must also demonstrate that he/she did not accept the breach or a change in the employment conditions before he/she resigned.

Example of such fundamental breach include non-payment of remuneration as and when it falls due, demotion in rank and/or failure to provide an employee with work and serious cases of sustained discrimination and/or mistreatment.

In the case of Moses Dlamini and Bromor Food Swaziland (pty) Ltd. I.C. Case No.127 of 1997, p.7; I referred to the case of Ferrant V Key Delta (1993) 14 KJ at pg.464 as follows;

“It is clear in terms of the Common Law, a contracting party is only entitled to cancel a contract on grounds of repudiation where the words or conduct of the other party are such as to evince a clear intention not to perform the obligation due under the Contract.....Dismissal of an employee is the ultimate result of the employer’s intention to end the employment relationship between it and the employee..... Constructive dismissal is only a manner or form in which dismissal can take place and should therefore comprise of all those elements which constitute actual dismissal. The expression ‘Constructive’ indicates that some of the elements of actual dismissal are not directly expressed though present.”

The court reiterates that the particulars of constructive dismissal relied upon by the Claimant herein are not factual to the extent that the Respondent has shown that the disciplinary action it took against the claimant was justified and well founded in the relevant statutes and the disciplinary code of the Respondent at the time.

Given the gravity of the matters under consideration and the number of agencies involved, it cannot be said that the time taken to conclude the disciplinary proceedings was inordinately long.

For the aforesaid reasons, the prayers by the Claimant for the court to declare that his employment was wrongfully and unfairly constructively terminated must fail and the same is dismissed.

These findings of the court equally deals a fatal blow to the prayers for reinstatement to his post of Managing Director without loss of salaries, allowances and other benefits from the date of suspension.

Furthermore, the alternative prayer for payment of full salary and allowances the Claimant would have earned for the full term of his three years contract is equally dismissed for lack of merit.

With respect to the claim for gratuity for six (6) years at the rate of 31% per every year worked no sufficient material has been placed before me to determine this matter in favour of the claimant especially with respect to the contract that had already been served. The pleadings do not disclose the basis of the claim and since no *viva voce* evidence was adduced at all in this matter, the court finds that the claimant has failed to prove he is entitled to payment of the gratuity and the prayer is dismissed accordingly.

In the final analysis the claim has failed in its entirety. The court makes no order as to costs upon taking into account, equitable considerations and in particular the financial circumstances of the claimant as at the time this suit was filed.

It is so ordered.

Dated and Delivered in Nairobi this 24th day of May, 2013.

Mathews N. Nduma
Principal Judge – Industrial Court