



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 110 OF 2012

DAVID RANDUCLAIMANT

VERSUS

MALINDI WATER & SEWERAGE COMPANY LTDRESPONDENT

J U D G M E N T

The claimant brings this suit against the respondent seeking declaration that his employment contract was unlawfully and unprocedurally terminated and that he is entitled to terminal dues amounting to ksh.2,161,325.45.

The respondent had denied liability contending that the claimant was only a director and the chairman of the respondent but not her employee. She raised a Preliminary Objection (P.O) to the suit alleging that the court lacked jurisdiction under Section 2 of the Companies Act to entertain the dispute as it related to damages for removal of a company director from office which is a matter governed by the Companies Act Cap 486 Laws of Kenya.

When the matter came up for hearing on 23/5/2013 Mr. Obura withdrew his P.O. and the matter proceeded to full hearing. Only the claimant testified as CW1 and called Abdul Aziz as CW2. The respondent however sought leave to dispense with her witnesses and instead file written submissions of which the claimant did not object.

CW1 told the court that on 24/5/2009 he was appointed to the chairman of the respondent for 3 years effective from 28/11/2008. His salary per month was Kshs.80000, accommodation of kshs. 10000, sitting allowance per day of ksh.20000, telephone ksh.5000 and ksh.2000 for mobile and house phone respectively. That on 25/6/2010 there was a General meeting called to adopt new memorandum and Articles of Association for the respondent. After the adoption of the new memorandum and Articles of Association, he invited the CEO of the Coast Water Services Board to make his closing remarks. Surprisingly the CEO declared that his Board was going to advertise vacancies for new directors of the respondents pursuant to the new Memorandum and Articles of Association adopted.

According to him there was no resolution ever passed in the General Meeting to dissolve the respondent Board of Directors. Indeed after the said declaration by the CEO, he continued to serve up to 19/11/2010 when he handed over office presumably to the directors. He therefore prayed for loss of benefit for the unexpired period of his contract of employment which he said was 13 months. The summary of his claim is as follows:

- a. salary (kshs.80000x13).....1,040,000

- b. sitting allowance (kshs.20000x8)..... 120,000
- c. per diem for 7 days trip to Israel

(USD 677 per dayx7) ksh.82.....388,598
- d. per diem for games in Mombasa

on 14th-16th September 2011..... 90.000
- e. other countrywide meetings during

unexpired period350,000
- f. loss due to loan taken from SACCO.....29,000
- g. lost interest after applying his fixed

deposit to pay the loan.....21,495

He produced letters and circular to support the above claims.

On cross examination he explained that he was appointed Director of the respondent by the Town Clerk of the Municipal Council of Malindi and later he was elected by the other Directors to be the Chairman on 28/11/2008. That before then he had served as the Chairman for another 3 years. He confirmed that he was a director of the respondent by virtue of Section 66 of her Articles of Association. He confirmed that he was appointed under Section 83 of the memorandum and Articles of Association and then a letter confirmed the appointment later. That the letter did not mention salary but allowances and honorarium which was taxable.

He confirmed that he was paid all his benefits for the period served before termination. He however contended that the amount claimed is what he would have earned during the unexpired period of his 3 years contract. That he was told to continue in office after the new memorandum and Articles were passed but then a new Chairman was elected in his absence. He admitted to having applied for appointment of a director after the new memorandum and Articles of Association were passed but he was not successful.

He however mentioned that there was no resolution to dissolve the Board and he did not understand that the adoption of the new memorandum and Articles of Association meant that new directors were to be appointed.

CW2 became a director for the respondent in 2009 and confirmed that the claimant was the chairman of the respondent. That following new guidelines from the Ministry, the respondent held a Special General meeting whereby new memorandum and Articles of Association were adopted. He however maintained that there was no resolution passed to dissolve the Board of Directors. He confirmed that only the claimant was getting a monthly salary of Ksh.80,000. He however confirmed that the word used in the appointment letter was Honorarium although Article 66 provided for remuneration. After the testimonies by CW1 and 2, the parties filed written submissions.

The issues for determination that arise from the pleadings, evidence and submissions are:

- a. **whether the court has jurisdiction to determine the suit.**
- b. **Whether the parties herein enjoyed employer-employee relation**
- c. **whether the said employment, if any, was unlawfully and unprocedurally terminated.**
- d. **Whether the claimant is entitled to the reliefs sought.**

The answer to the first issue is dependent on the answer to the second issue which I will consider first. It is not in dispute that the claimant was a director and the chairman of the Board of Directors for the

claimant. It is also not in dispute that his appointment was pursuant to Section 66 of the respondent's memorandum and Articles of Association. It is further not in dispute that his remuneration comprised a predetermined automatic honorarium and telephone allowance plus other *ad hoc* allowance depending on duty.

The claimant has insisted that he was both a director and an employee for a 3 years contract. The respondent has denied that the claimant was her employee within the meaning of the Employment Act and contended that he was only a Director in the context of the Companies Act.

The court was urged to consider the English case of **EATON V ROBERT EATON LTD & ANOTHER [1988] IRIR 83** which laid down the following tests to be applied while determining whether a director is an employee or not :

- a. **did the director have a descriptive titled like marketing director, managing director or sales director?**
- b. **Was there an express contract of employment, or if not, was there a board minute or memorandum consisting an agreement to employ the director as an employee?**
- c. **Was remuneration paid by way of salary or directors fees?**
- d. **Was remuneration fixed in advance or paid on an *ad hoc* basis?**
- e. **Was remuneration by way of entitlement or, in effect gratuitous (in other words , was the director in a position to sue for it)?**
- f. **Did the director merely act in his own capacity as a director or, was he under control of the board of directors in respect of the management of his work?**

Going by the above tests, I regrettably find that the claimant was not an employee of the respondent. He did not have a descriptive title like managing director, sales director or at all. He did not also have an express contract of employment or minute or memorandum by the the board of directors appointing him as an employee. Although his remuneration was fixed in advance, the same was gratuitous as opposed to an entitlement. His letter of appointment granted him only an honorarium as opposed to salary or wages. It is common knowledge that honorarium is a discretionary reward given in circumstances were legally or traditionally remuneration would not be paid. The use of the term honorarium in the letter of appointment was therefore deliberate in order to alert the claimant that the same was not an entitlement and therefore not guaranteed. The courts decision in **The Eaton's case** is corroborated by section 2 of the Employment Act of Kenya which defines an employee as a person who is employed for wages or salary.

In view of the foregoing finding that there was never any employment relationship between the parties herein, the court is ousted of the jurisdiction to determine the dispute involved in the suit. Section 12 of the Industrial Act read together with Article 162 of the Constitution of Kenya limits the jurisdiction of this court only to disputes related to employment and labour relations. On the other hand section 2 of the Companies Act Cap 486 grants to the High Court the exclusive jurisdiction to determine all disputes related to the business and affairs of companies. The present case is clearly about the removal of a director from office and in my view it is filed before the wrong forum. The court therefore agrees with the defence that this court lacks jurisdiction to determine the real dispute involved on the merits. Consequently I see no need of dealing with the 3rd and 4th issues for determination.

In conclusion therefore, and in order to give the claimant another day in court I will only strike out the suit with no order as to costs.

Signed, dated and delivered on this 4th day of October 2013

ONESMUS MAKAU

JUDGE