



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1332 of 2011

ENGINEER IDDI ALI MWASINA APPLICANT

VS

COAST WATER SERVICES BOARD RESPONDENT

JUDGMENT

The issue before the Court is unlawful dismissal of the Claimant by the Respondent.

The claimant filed his Statement of Claim dated 29th July 2010 on the 8th of August 2011, through the firm of Mogaka Omwenga & Mabeya Advocates. In his statement, the claimant stated that by a contract in writing made between him and the Respondent on 30th November 2008, he was appointed the Respondent's Chief Executive Officer for a period of 3 years. This contract was later renewed for a further period of 3 years from 1st December 2008 to 30th November, 2011.

The Claimant states that it was an implied term, of the contract that he would continue in employment until determined as per the terms of the contract or until 30th November, 2011 whichever was earlier. That it was further implied that at the end of the contract, the Respondent would pay him gratuity equivalent to 31% of his annual basic salary.

The claimant states that sometimes on 25th January 2010 or thereabouts he proceeded for his annual leave for 51 days, but when he reported back on 6th April, 2010, he found his office occupied and he was told to wait for directions. The claimant waited for directions which were never given. By an advertisement made on 29th June 2011, in the Daily Nation the Respondent advertised for the Claimant's position and declared the same to be vacant yet the Claimant's contract of employment was intact.

The Claimant further avers that the action by the Respondent was unjustified, unfair and unlawful because his contract had not been terminated nor lapsed; the Respondent failed and neglected to explain to the claimant the circumstances of his office falling vacant; the Respondent advertised the Claimant's position yet the Respondent had advised the claimant to wait for directions as to his office; the respondent did not explain to the claimant why or whether it intended to terminate his services and the Respondent's actions were unjustifiable or with any valid reason. The claimant states that when he went on leave in January 2010, he was 54 years and his monthly gross pay was 305,000/=. By reason of the Respondent's action the claimant avers that he was deprived of his salary and other benefits/emoluments which he would have otherwise earned until the end of his contractual period on 30th November, 2011 and other

benefits appertaining thereto and he has thereby suffered loss and damage. The Claimant seeks an order for payment of his salary and benefits from February 2010 to November 2011, including 3 years gratuity and leave allowances due as follows:

(a) Gross salary – 22 months at 305,000	=	6,710,000
(b) Gratuity at 31% of annual salary	=	1,134,600
Sub Total	=	7,844,600
(c) Unpaid leave allowance for the 57 days	=	50,000
Total due	=	7,894,600

The Claimant also seeks a declaration that his termination was unlawful and a nullity. He also seeks costs of this suit.

The Respondent on the other hand filed their Memorandum of Reply dated 6th February 2012, on 7th February 2012 through the firm of Miller & Company Advocates. The Respondent admits that the claimant was their Chief Executive Officer for the contract periods of 3 years commencing 1st November 2005 and 1st December 2008 respectively.

They however deny that it was an implied term of this second contract that the contract would continue until determined as per terms of the contract until 30th November, 2011 whichever was earlier. They also deny that the claimant was entitled to 31% of his annual basic salary at the end of this employment. On the contrary they state that it was a stated term that upon successful completion of each contract term that the claimant was to qualify to a one off gratuity payment calculated at the rate of 31% of his annual basic salary and that this gratuity would be taxable. Such gratuity was not payable if the claimant was to be summarily dismissed on grounds of gross misconduct. The Respondents further state that it was further agreed that if the claimant was on a secondment and a member of such other retirement benefit scheme, he may opt to continue with the said scheme. They deny that the claimant was entitled to payment of gratuity under the second contract as the contract was terminated by the Ministry of Water and was never completed.

The Respondents further aver that it is true the claimant applied and was granted permission to go on leave on 25th January, 2010 but prior to claimant proceeding for his leave he had received a letter dated 13th January 2010 sent by fax to him and copied to the Respondent informing the claimant that he had been re-deployed to the Ministry of Water Headquarters with immediate effect and that he needed to report to the headquarters by 18th January 2010. The said letter is annexed as Appendix 3.

The Respondent further averred that by a letter dated 13th January, 2010, the Ministry of Water further notified Mr. Andy Maro Tola that he had been appointed the new Acting Chief Executive Officer of the Respondent with immediate effect and directed him to report to the Respondent's office by 10th January, 2010. This is as per the Respondent's exhibit Appendix 4.

The Respondents contention is that the claimant's redeployment back to the Ministry of Water headquarters and reassignment of duties was by the Ministry of Water and that the Respondent had nothing to do with it. The Respondent state that they were not privy to the operations of the Ministry of Water. The Respondent deny they authored or caused any advertisement for the post of their Chief Executive as alleged by the Claimant. The Respondent state that the claimant ceased to be in their employ once he was redeployed to the Ministry of Water headquarters and therefore the Respondent are not privy to any disciplinary action taken against the Claimant by the Ministry of Water as exhibited Exhibit Appendix 5.

The Respondent further content that they cannot be condemned to pay for any alleged loss and/or

damages, as they had no role in claimant's redeployment to the Ministry of Water headquarters. The Respondent further state that they are the ones entitled to claim from the claimant three months pay in lieu of notice since he was suddenly redeployed to the Ministry of Water headquarters whilst his employment contract was still valid. The Respondent further counter claims for money paid to the claimant erroneously on 12th May, 2010 as mileage allowance of Ksh.124,388.25 as per Exh appendix 8.

By consent of the parties, the court was expected to proceed and make its findings from the pleadings filed before it. No witness was called by either party. The parties also agreed to file final submissions which they did. Having considered the evidence filed by the parties through their respective pleadings and submissions, this court has to determine the following issues:

1. Whether the claimant's services were unlawfully terminated by the Respondents.
2. If so, who was responsible for the unlawful termination.
3. If there was unlawful termination what remedies if any is the claimant entitled to.

On the first question I will be guided by the genesis of how the claimant ended up working for the Respondent. The claimant was previously employed within the Ministry of Water and Irrigation. Vide a letter dated 18th November, 2004 ref. No. EST/85104211/(94) from the Permanent Secretary Ministry of Water and Irrigation, the Claimant was deployed to Coast Water Services Board. The letter in part stated that:

“the duties attached to this post will be spelt out by the Board to whom you will report on your day to day operations. Your present terms and conditions of service, pay point and personal emoluments will remain the same”

In effect this letter served as a transfer. However vide another letter dated 12th October, 2006 Ref. No. 85104211(104) from the Permanent Secretary, Ministry of Water and Irrigation, the claimant was now seconded to the Coast Water Services Board for a period of three years with effect from 1st November, 2005. The letter states in part:

“After the three years, you are advised either to opt to resume duties in the Civil Service or join the Board in a substantive capacity.....”

The wording of this letter shows that the claimant remained an employee of the Ministry of Water and Irrigation for three years with effect from 1st November 2005. On 29th November the claimant received a letter Ref. No. CWSB/CON/104/VOL 1/8 from the Respondent indicating that he had been appointed as the Chief Executive Officer of the Respondent following a successful interview. This was to be for a period of three years with effect from 1st November 2005. This I believe was in tandem with the Ministry's secondment for three years also with effect from 1st November, 2005.

At the expiry of the three years period and in opting to choose whether to go back to the Ministry or not as per his secondment letter, the claimant seems to have, opted to remain in the Respondent's employment and this prompted the Respondent to offer the claimant yet another three term contract. It appears that the Respondent through their Chairman Hamisi A. Mwachai wrote to the Permanent Secretary Ministry of Water and Irrigation on 14th April 2008, letter Ref. No. CWSB/CHMB/9/VOL.11/1 requesting that the Claimant be re-appointed as its Chief Executive Officer. Vide a letter dated 15th April 2008, Ref. No. MWR/016A/7/1 VOL.II (89), the Permanent Secretary, Ministry of Water wrote back stating

“We refer to your letter Ref. CWSB/CHMB/9/VOL.II/1 dated 14th April, 2008 on the above issue.

We are pleased to convey the concurrence of our Hon. Minister with the decision of Coast Water

Services Board to renew the term of contract of Eng. Iddi Ali Mwasina the current Chief Executive Officer of the Board for another three (3) years.

You are therefore asked to go ahead and renew Eng. Mwasina's term of contract as the Chief Executive Officer for Coast Water Services Board for another three (3) years with effect from 1st December 2008.

Please proceed.

Yours

SIGNED

**Eng. Mahboub M. Maalim, CBS, OGW
Permanent Secretary”**

Following this letter from the Permanent Secretary the Claimant was offered another contract of three years by the Respondent. At this point, this court's understanding is that he ceased to be an employee of the Ministry of Water having opted to remain in the employment of the Respondent as per the secondment letter.

This second contract was for three years with effect from 1st December 2008. As per the terms of this contract, the claimant was entitled to gratuity as follows:

“Upon successful completion of each contract term, you will qualify for a one off gratuity calculated at the rate of 31% of your annual basic salary. This gratuity is taxable. The gratuity shall not be paid if your separation from the Coast Water services Board is due to gross misconduct as provided for the Employment Act. If you are on secondment or a member of some other retirement benefit scheme, you may opt to continue with the retirement benefits scheme to which you are already a member”.

The Respondents have contended that Claimant was not entitled to gratuity, however this contract agreement is clear that he was entitled to it but as a one off payment at the rate of 31% of his annual basic salary.

Another part of this contract dealing with termination states that:

“This contract may be terminated by either party giving a three months prior notice or on payment of any equivalent of three (3) months basic salary and house allowance only in lieu notice.”

This offer was accepted and signed by claimant and Respondent on 21st April 2008. It states that it superceded any other arrangements hitherto entered into with claimant and Respondent.

As claimant starts off this new contract, he is no longer an employee of the Ministry of Water and Irrigation. It is therefore apparent that on 13th January 2010 when the Permanent Secretary, Ministry of Water and Irrigation purports to redeploy him back to the Ministry headquarters, this action is null and void. The Claimant had already been appointed by Respondent as provided for under Section 54(1) of the Water Act which states that:

“There shall be a Chief Executive Officer of each Water Services Board who shall be appointed by the Board and whose terms and conditions of service shall be determined by the Board with the approval of the Minister.”

Since claimant was an employee of Respondent and not of the Ministry, the Permanent Secretary's action was null and void. It is true the appointments have to be approved by the Minister, we however do not have any evidence of some communication from the Board and reason thereof to the Minister seeking dismissal of the claimant. If indeed the claimant had failed in one way or another, disciplinary action would have been initiated by the Board and findings and recommendations forwarded to the Minister for

action. No disciplinary action was initiated against the Claimant. The Respondent had submitted that the claimant was summarily dismissed. Provision in law on summary dismissal is provided for under Section 44 of the Employment Act which states as follows:

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

In this case it has not established the claimant did commit any of the acts listed. It is therefore not true that the claimant was summarily dismissed. Redeployment to the Ministry headquarters did not amount to summary dismissal.

The Respondent had also counter claimed for Ksh.124,388.25, they claim was paid to the claimant erroneously after his contract had been terminated. As I have made a finding that the purported deployment of the claimant to the Ministry headquarters is blatant disregard to the fact that his employee was the Respondent, then as the claimant was being paid this mileage in May 2010 he was still in the employment of the Respondent. The counter claim must therefore fail.

As at January 25th 2010, the claimant proceeded on 51 days leave approved by the Respondent and he resumed duty on 6th April 2010. He was not paid his salary for February and March 2010 while on leave. The claimant attempted to communicate to the Respondent about the need to clarify his position but this fell on deaf ears. This is what led to this cause being filed herein.

Having made a finding that the claimant was wrongfully dismissed, who was responsible for this? I have already alluded to the fact that the claimant was an employee of the Respondent. When the claimant complained of the wrong doing by the Ministry, the Respondent lay back and its Board that had hired him took no action to correct the anomaly. Sitting back and claiming that it was the action of the Ministry did not help the case much. The Respondent had approved the claimant's leave of 51 days and yet they also stopped paying him his salary immediately he proceeded on leave. Given this scenario, I find that the

Respondent was responsible for the wrongful dismissal of the claimant.

What remedies if any is the claimant then entitled to? The claimant sought a declaration that the termination was unlawful and a nullity. He also sought an order reinstating him to work or alternatively award in his favour Ksh.7,894,600/=.

Having found that he was wrongfully terminated, I enter judgment for the claimant and order as follows:

1. The termination of the claimant by the Respondent was unfair and wrongful.
2. The claimant is entitled to payment of his gratuity calculated on prorata basis for the period served under his last contract. This translates to gratuity from 1st December 2008 to April 2010 when he learnt he had been dismissed = 17 months. This translates to

$$17 \text{ months} \times (31\% \text{ of } 305,000) \\ = 17 \times 94550 = 1,607,350/=$$

3. 3 months salary in lieu of notice i.e. $305,000 \times 3 = 915,000/=$

4. Salary for the months of February, March and April 2010 worked but not paid for = 915,000/=

5. 6 months salary compensation for unlawful termination
 $= 6 \times 305000 = 1,830,000/=$

6. Unpaid leave allowance = 50,000/=

GRAND TOTAL = 5,317,350/= Less statutory deductions

7. Claimant to be issued with a certificate of service.

8. The Respondent shall bear the costs of this case.

Dated, signed and delivered this 23rd day of October, 2012 before Court Clerk Rachel Gichuki, Nyabena holding brief for Mogaka for the Claimant and Miss Ileri holding brief for Okello for the Respondent.

HELLEN WASILWA

JUDGE