REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: TUNOI, OWUOR & KEIWUA, JJ.A.)
CIVIL APPEAL NO. 138 OF 2001
BETWEEN

P. K. LANGAT
ANDREW A. MONDOH .....APPELLANTS
AND
RAPHAEL M. A. JUMA ..... RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Nakuru (Ondeyo, J.) dated 19th October, 2000
in
H.C.C.C. NO. 509 OF 1992)
****

JUDGMENT OF THE COURT

The facts giving rise to this otherwise an interesting appeal are largely not in dispute and are briefly as follows. Raphael M.A. Juma, the respondent and the Plaintiff in the suit, was at the material time the General Manager of Mumias Outgrowers Company Limited (hereinafter called "MOCO"). Andrew A. Mondoh, the second appellant and the second defendant in the suit, was the District Commissioner, Kakamega, and also; the Chairman of the Board of Directors of MOCO while P.K. Langat, the first appellant and the first defendant in the suit, was the District Officer 1 working underO nt he1 7stehc onAdu gaupspte,l la1n9t9.2, having worked for MOCO for an uninterrupted period of fifteen years, the respondent was in his office at about 4:00 p.m. when the first appellant accompanied by six heavily armed administration police officers and one, - Chief Inspector Kiplelei, stormed the respondent's office and informed him that the group was under firm instructions from State House, Nakuru, to remove him forthwith from office.

Indeed, the respondent being an experienced officer, demanded proof of such instructions without which he would not oblige. Chief Inspector Kiplelei then suggested that the best course open to them all was for the first appellant to write down the instructions. This, the first appellant did in the form of the following document which was exhibited in the superior court:

- **"Acting on instructions from the D.C. Kakamega I have instructed the General Manager MOCO to vacate his office with immediate effect. The following activities took place.**

(1)He vacated the office as ordered.

(2)He surrendered the si x door keys (for his office and his secretary).

(3)The security was stationed to guard the building until further instructions.

Signed P. K. Langat

D.O.1 Kakamega.

Witnessed by: Chief Inspector Kiplelei (Signed)".

So soon as the respondent was served with the above document, he was grabbed, forcefully removed from the chair and marched out of the office which was then securely locked. The first appellant left but stationed administration police officers there to ensure that the respondent did not regain access of it. The respondent went to his house but found that the telephone had been disconnected. Fearing for his security, he went to his rural home in Naitiri where he remained until 24th August, 1992, when he received a letter dated 19th August, 1992, written and signed by the second appellant in his capacity as the Chairman of MOCO. The letter is reproduced below in full:-

" **MUMIAS OUTGROWERS COMPANY**

(Limited by Guarantee) P. O. Box 132

MUMIAS

Tel:41012

Our Ref: Pers 1/ 92/655

Your Ref: Dated: 19th August, 1992

Mr. R. M. Juma,

P. O. 132,

MUMIAS

RETIREMENT ON PUBLIC INTEREST

On 17th August, 1992, the Government decided that you be retired on public interest and the MOCO Special Board Meeting held on 19th August , 1992 in the MOCO Boardroom endorsed this Government decision. You will be paid your full terminal benefits following this retirement on public interest. To ensure a smooth continuity of the office of the General Manager you are hereby asked to hand ove r to the acting General Manager as appointed by the special Board Meeting of 19/8/1992. This handing - over should take place on Friday 21st August, 1992 and to be witnessed by the District Officer 1 Kakamega. On behalf of the MOCO Board, I would like to t hank you very much for having served this company for fifteen years continuously. Yours faithfully,

for MUMIAS OUTGROWERS CO. LTD.

A.A. MONDOH

CHAIRMAN (MOCO)"

On receipt of this letter, the respondent filed suit against the appellants seeking various orders, inter alia:-

(a)A declaration that the defendants had no right to interfere with the plaintiff's employment either by themselves or as agents of any third party;

(b)A declaration that the second defendant was not authorised to write the letter dated 19th August, 1992 and that the said letter and minutes of 19th August, 1992 are ultra vires as against the plaintiff and otherwise;

(c)A declaration that the plaintiff is still an employee of the said company;

(d)Reinstatement of the plaintiff to his employment;

(e)A permanent injunction restraining the Defendants, their servants and or agents from barring the plaintiff's entry into his office and, or in any way interfering with his duties as the General Manager of Mumias Outgrowers Company Limited;

(f)General damages;

(g)Special damages.

In their written statement of defence the appellants aver that the second appellant acted in his capacity as the Chairman of MOCO. The respondent's services were terminated for gross misconduct and inability to discharge the duties and functions of the office of the General Manager of MOCO. A Special Board Meeting of MOCO had decided on 19th August, 1992 to retire the respondent in the public interest with full retirement benefits and that his services had been terminated lawfully and properly. The learned Judge in a reserved judgment held that the decision to retire the respondent in the public interest lacked any legal basis because the decision to do so did not belong to MOCO Board of Directors. She further held that the meeting of 19th August, 1992, lacked a quorum and the Board could not, therefore, in the circumstances, have made a decision to terminate the respondent's services. She could not make a declaratory order of reinstatement because the respondent was already beyond the mandatory retirement age, and also; because MOCO had already engaged the services of another General Manager.

The learned Judge had no hesitation in condemning the second appellant for having interfered with the employment of the respondent and for having made it difficult for him to go and resume his duties after his physical removal by the first appellant on 17th August, 1992. The learned Judge made two declaratory orders against the appellants. Firstly, that they had no right to interfere with the respondent's employment; secondly, that the second appellant had no authority to write the letter dated 19th August, 1992, and that in so doing, he had exceeded his powers as the Chairman of MOCO. She ordered the appellants to pay general damages of Shs.150,000/- for the respondent's wrongful termination of services. Further, she awarded the respondent Shs.477,259/20 as loss of income for seven (7) years from September, 1992 at the rate of Shs.16,898/35 p.m.

The main thrust on this appeal against the judgment made by the learned Judge is two fold. It is contended, first, that it was an error on her part not to have found that the proper defendants in the suit should have been MOCO and/or the Attorney General and in holding that the decision to terminate the respondent's services did not emanate from the Board of Directors of MOCO. Secondly, it is argued, that none of the benefits awarded by the learned Judge are payable since they are based on wrong

principles of law.

The synopsis of the letter of termination is that MOCO endorsed, approved and sanctioned the termination of the respondent's services in the manner that it was done. MOCO also is holding itself responsible for the payment of the respondent's full terminal benefits. The letter is written by the second appellant as the Chairman of MOCO and for MOCO and on its behalf. In other words and in very simple terms, MOCO is saying to the respondent: "Come to us for payment and do not go to anyone else". Our perusal of the resolutions of the Board of Directors of MOCO reveals that the second appellant, as Chairman of MOCO, was vested with substantial powers of management over MOCO. He was in charge of policy matters as well as administrative acts of routine nature such as the power to draw and endorse any cheques on the account of MOCO or to sign any documents for and on its behalf. He was, thus, a director who in fact carries on the day to day business of MOCO. He was also the executive head of the company and, subject to the control of the Board of Directors of the Company, he in actual fact, controlled the entire MOCO's affairs.

It is trite that directors are in the eyes of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name of or purporting to bind the company, it is the company - the principal - which is liable on it, not the directors; they are not personally liable unless they undertook personal liability. See Palmer's company Law **Vol. 1, 22nd Edn page 627.**

The second appellant as Chairman of MOCO derived his powers and duties from both the Government and MOCO. Firstly, he has to be the District Commissioner of Kakamega District. Secondly, by virtue of his Civil Service position he becomes a director of MOCO and automatically its Chairman. Thirdly, Government policies and decisions were channelled through him to the Board of MOCO. These were automatically passed and implemented without any let or hindrance. Fourthly, once passed the resolutions belonged to MOCO. It is manifestly clear therefore that the second appellant had two functions and two capacities. As a Civil Servant he represented the interests of the Government in Kakamega District and as a Chairman and director of MOCO, he was the agent of MOCO. There is nothing actually anomalous in this. It is difficult in these circumstances to understand how the learned Judge could deem the appellants' actions as personal and not those of MOCO or the Government of Kenya.

The Articles of Association generally fix, or enable directors of a company to fix, the quorum for a board meeting, that is to say, what number of directors must be present to enable them to act as a board and exercise the powers vested in the directors collectively. On 19th August, 1992, five directors were present and four were absent with apology. On 3rd September, 1992, eight directors were present. None of the directors raised the issue of lack of quorum of the meeting of 19th August, 1992. The learned Judge found: ***"The memorandum and articles of association of MOCO was not produced as exhibit to show what the quorum of a board meeting was."***

As the parties were not ad idem as to what constituted the quorum for a board meeting, the learned Judge in the absence of these very basic documents, these being the memorandum and the articles of association, and in view of the fact that the total number of directors is nine, gravely misdirected herself when she held that the said meeting lacked the requisite quorum and the meeting was irregular and could not transact business.

A glance at the minutes of the Board meetings of MOCO shows that the decisions of the board were made by a majority of the entire membership of the Board present. It is futile, therefore, for the

respondent to complain that the second appellant had no colour of right or authority to write the letter of 19th August, 1992 terminating his services. Moreover, the second appellant's actions were approved and confirmed by the Board of MOCO on two occasions. We think that if the respondent had accepted the said letter it could have constituted a mutuality of will between the parties and could have created a legal bond or tie or contract upon which the parties could be bound by it or entitled under it. The respondent's services with MOCO were based on a written contract dated 4th July, 1977. The contract provided, inter alia, for termination of services by giving three clear calendar months notice in writing. However, it is now apparent that this condition was not called into effect. The learned Judge did find that the second appellant interfered with the respondent's employment and made it difficult for him to go back to office. In our view, this holding has no basis in law. The second appellant did not act alone. He acted on behalf of the Board of MOCO and whatever decision was passed to terminate the services of the respondent was done on behalf of the Board of MOCO which endorsed the same. The second appellant is not personally liable.

And, if the respondent was indeed aggrieved all that he could do was to sue MOCO for any perceived breach of contract. It is manifestly clear that a minority of directors of MOCO did not want to dispense with the services of the respondent, but, there was no board decision to take him back showing that MOCO did not want to retain his services. As for the first appellant, he had no power over MOCO and could not order it to re-employ the respondent. We would agree with Mr. Oriri, counsel for the appellants, that the appellants were wrongly joined in the proceedings - and that they were not the proper parties to the suit. We hold that the proceedings against them were indeed vexatious and oppressive. The appellants, who have been represented throughout the proceedings and in this appeal by the Attorney General, aver that they were Government employees and they acted in the course of their duty and no proceedings to enforce a remedy for tort will lie against them in their personal capacity as they acted in a representative capacity. Under section 4 of the Government Proceedings Act, the Act, the Government is subject to all those liabilities in respect of torts committed by its servants or agents. It has not been denied that the appellants are Civil Servants whose acts against the respondent have been approved by the Government.

In Salmond on Torts (17th edn) page 466 it stated that:

"a master is not res ponsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be m erely coincident in time with it."

In **Hilton v. Thomas Burton** (Rhodes) Ltd [1961] 1 ALL ER 74 at 77 Diplock J (as he then was) said:

"I think that the true test can be expressed in these words: was the (servant) doing something that he was employe d to do" If so, however improper the manner in which he was doing it, whether negligent ... or even fraudulent ... or contrary to express orders ... the master is liable. If, however, the servant is not doing what he is employed to do, the master does no t become liable merely because the act of the servant is done with the master's knowledge, acquiescence or permission."

Though we do not approve of the over zealous manner in which the appellants carried out the undisclosed orders supposedly "from above", we, nevertheless, see that the appellants were employed to do what they did. The orders they carried out were not contrary to the express orders of their employer.

With respect we agree with Mr Oriri that the appellants were the authorised agents of the

Government of Kenya in the course of their duty when they prematurely brought to an end the services of the respondent in MOCO. The tortious act, if any, must be deemed to have been committed by the Government itself inasmuch as it was committed by its authorised agents in their course of their duty. This being our view of the matter, the respondent's suit, if contemplated, ought to have complied with section 13A of the Act and failure to do so would have rendered the suit bad in law.

For these reasons we allow the appeal with costs. The judgment of the superior court is set aside and substituted with an order dismissing the suit with costs.

Dated and delivered at Nakuru this 16th day of November, 2001.

P. K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR