



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL 595 OF 2005

INSPECTOR-GENERAL (CORPORATIONS) APPELLANT

VERSUS

MWAKAI KIKONDE SIO RESPONDENT

(Being an appeal from the Judgment and Decree of the Chairman State Corporations Appeal Tribunal in Nairobi Appeal No. 073 of 2004 dated 12th July 2004)

JUDGMENT

The Respondent, Mr. Mwakai K. Sio, was the Principal of Utalii College from 15th July, 1986 to 21st November, 2003 when his services were terminated.

During his tenure as Principal, the College and the Respondent became actively involved in the activities of EUHOFA Congress, requiring the Respondent's attendance at such meetings. In 1996, the College offered to host the Congress in Kenya, and in keeping with the tradition of the role played by spouses of the heads of institutions of the host nations, the Respondent sought approval from the College for his wife's participation, and attendance at meeting of the Congress. In the process, the College incurred huge expenses, amounting to Shs.3,477,764.25. All these expenses related to the travel and accommodation of Ms. W.M. Sio.

On 8th October, 2004, the Inspector General, State Corporations, issued a Certificate of Surcharge No. 073, demanding, within thirty days, the said sum of Shs.3,477,764.25 being sums "irregularly claimed" in respect of "expenses incurred by Mrs. W.M. Sio while accompanying (the Respondent) to EUHOFA Congress meetings."

The Respondent lodged an Appeal against the said surcharge certificate to the State Corporations Appeal Tribunal (hereinafter "the Tribunal"), and by a decision handed down on 12th July, 2005, the Tribunal **allowed**, in substantial part, his Appeal. The Tribunal's decision was stated as follows:

a) The Appellant had no authority from the Board of Governors of Kenya

i College to travel with his wife to the EUHOFA Conference for the period 1993 to 1995. Therefore the sum of Kshs.865,892/50 which was spent on Mrs. Sio's travel and accommodation expenses is the amount Mr. Sio should have been surcharged for, as the same is justifiable to the extent that

the Appellant received the sum.

b) (i) For the period 1996 to 2002 the evidence on record shows that the Appellant's terms of employment allowed him to travel with his wife to EUHOFA Congress meetings and therefore the sum of Kshs.2,611,871/75 which was spent on the said congress meetings was duly authorized and expended and the same cannot form part of the surcharge monies."

The Inspector-General, being dissatisfied with this decision, filed an Appeal to this Court, citing the following twelve grounds of Appeal:

"1. THAT the Tribunal found that the Board of Governors of Kenya Utalii College was the lawful body to approve the request by the Respondent to have his wife travel to EUHOFA Congress meetings at the expense of the college and further, that as regards the period 1996 to 2002 the Respondent produced in evidence the minutes of a sub-committee of the Board of Governors of 30th July 1996 which approved the revised terms of his emoluments but that these Minutes contained resolutions and recommendations that do not seem to have been ratified by the full meeting of the Board of Governors of 27th June 1996 as alleged by the Respondent but erred in finding that the sum of Ksh.2,611,871/75 which was spent by the Respondent's wife on congress meetings between 1996 and 2002 was duly authorized and expended.

2. THAT the Tribunal erred in law and in fact in finding that between the period 1996 to 2002 the Respondent's terms of employment allowed him to travel with his wife to EUHOFA Congress meetings with the wife's travel and accommodation expenses being met by Kenya Utalii College.

3. THAT the Tribunal erred in law and in fact in finding that the sum of Ksh.2,611,871/75 which was spent on the EUHOFA Congress meetings by the Respondent was duly authorized and expended and that the said sum cannot form part of the surcharge monies.

4. THAT Tribunal erred in law and in fact in accepting the Respondent's submission that his revised terms of employment of 1st July 1996 were effected through the recommendations of the approved special committee appointed by the Board of Governors.

5. THAT the Tribunal found that there was no evidence adduced by the Respondent to show that there was a Board of Governors meeting that approved the revised terms of the Respondent's emoluments as recommended by the Sub-committee but erred in finding and holding that the Respondent's emolument package was approved by the Board of Governors.

6. THAT the Tribunal found that the minutes of the Board of Governors of 27th June 1996 confirmed at Minute No. 4576 of page 6 that a general wage revision for the staff by a margin of 20% was effected from 1st July 1996 and that the Respondent's salary was therefore revised alongside the general revision of the salaries for the rest of the staff but erred in law and in fact in finding that the revision included and allowed the Respondent's wife to travel to EUHOFA Congress meetings with her travel and accommodation expenses to be met by Kenya Utalii College.

7. THAT the Tribunal erred in law and in fact in assuming, and holding that the minutes of the Special Sub-committee of 30th July 1996 were the minutes of the Special Sub-committee of 30th June 1996.

8. THAT the Tribunal erred in law and in fact in assuming, and finding that the Special Sub-

committee appointed by the Board of Governors has legal authority and capacity to approve and implement its own resolutions and recommendations before and/or without the resolutions and recommendations are tabled before a full meeting of the Board of Governors for approval.

9. THAT the Tribunal erred in law and in fact in ordering that the Certificate of Surcharge issued by the Appellant should be amended, and be amended to reflect that the surcharged sum of money is Ksh.865,892/50 instead of Ksh.3,477,764/25.

10. THAT the Tribunal erred in law and in fact in failing to find that the Respondent irregularly and illegally claimed for, and was paid Ksh.3,477,764/25 being costs and expenses paid for by Kenya Utalii College to meet Mrs. W.M. Sio's travel and accommodation expenses while purportedly attending EUHOFA Congress meetings between the period 1993 to 2002.

11. THAT the Tribunal erred in law and in fact in allowing the Appeal by the Respondent to the extent of Ksh.2,611,871/75.

12. THAT the Tribunal erred in finding and ordering that the Respondent pay costs of the State Corporations Appeal Tribunal limited to the sum of Ksh.865,892/50."

Essentially, the issue for determination in this Appeal, is whether the travel expenses relating to Mrs. Sio amounting to Shs.2,611,871/75 were indeed properly approved, and in which case the same cannot be surcharged.

Mr. A. Ndambiri, Counsel for the Appellant, has argued strongly before this Court that the entire sum of Shs.3,477,764.25 had not been properly approved, and had been claimed by the Respondent unlawfully, and the same is repayable. His argument essentially rests on the principle that the Respondent's emoluments could be approved only by the Board of Governors of the College, and by no other person, including the Chairman, acting unilaterally. A decision of such magnitude by any other person, whether the Chairman of the Board of Governors, or a "Sub-Committee" appointed as such, could not be effective unless ratified by the Board. In this case, Mr. Ndambiri argues, the Respondent has not shown any evidence to demonstrate that the Board had either approved, or ratified, the travel expenses of Mrs. Sio. He cites a letter dated 8th August, 1996 from the Chairman of the College addressed to the Principal, Mr. M.K. Sio, in which the Chairman stated clearly that the Board had appointed "a Sub-Committee" to deal with the matter, **but there was no evidence** that such a Sub-Committee was ever appointed, or its purported decision ever ratified by the Board. Mr. Ndambiri argued that in arriving at its decision the Tribunal relied on the Minutes of a Special Sub-Committee meeting held on 30th July, 1996 (this could have been 30th **June**, 1996 as per the Chairman's letter of 8th August, 1996). However, there was no evidence that the Board had ever ratified that decision, and the Tribunal had itself expressed doubts in its Judgment (on Page 358 of the Record) whether those expenses were ever approved by the Board. So, if the Tribunal had "doubts", why hold that the same were approved" asks Mr. Ndambiri. In any event, Mr. Ndambiri argues that even if the expenses were approved by the Sub-Committee, they were still subject to final approval by "the Chairman" in accordance with Min. No. SC2 of the meeting held on 30th July, 1996 (see page 352 of the Supplementary Record). According to Counsel, there is no evidence that the "final approval" was ever given by the Chairman.

Mr. Ochieng Oduol, Counsel for the Respondent, submitted that the Respondent did not sit on the Board of Governors meetings deliberating on his emoluments. He was entitled to rely on the letter dated 8th August, 1996 that he received from the Chairman, and the rest of the procedures were "internal" to the College. In his view, the Board of Governors "delegated" the task to the Sub-Committee, which

approved the Respondents “package”, including the travel expenses of his wife.

Mr. Oduol submitted that the Tribunal correctly found that the sum of Shs.865,892.50 expended by Mrs. Sio during the period 1993 to 1995, had indeed not been approved by the Board, but that the sum of Shs.2,611,871.75 was an approved expense, in respect of which no surcharge could be imposed.

Having perused the voluminous materials presented to this Court, and having heard able submissions from Counsel, and having considered the relevant and material evidence before this Court, **I have come to the Conclusion that the Tribunal arrived at the correct decision based on the evidence before it, and I will uphold its decision for the following reasons.**

Both sides agree that in accordance with Sections 12 and 13(1) of the Hotel and Restaurants (Kenya Utalii College) Regulations 1987 (hereinafter “the Regulations”) it is the Board of Governors of the College, and not its Principal or any other person, that is mandated to approve the emoluments of the Principal and Senior Staff.

The issue before the Court is whether the Board approved the expenses of Shs.2,611,871/75 which is the subject of dispute in this Appeal. The test to be applied in this case, as in all civil cases, is the balance of probabilities test: **whether on a balance of probability the Court is satisfied that the Board of Governors did indeed approve the expense which is the subject of dispute before the Court.**

Now, let us look at the evidence available to this Court, and relied upon by the Tribunal.

1. On 15th September, 1993, the Respondent wrote to the Chairman of the Board seeking approval for his wife’s participation and travel to the EUHOFA Congress. On 16th September, 1993 the Chairman granted the approval. And the Respondent claimed expenses of Shs.865,892.50 during the period 1993 to 1995 pursuant to this approval. The Tribunal correctly found that the Board had neither approved nor ratified the Chairman’s approval, and that the Respondent was personally liable for the same. There is no dispute about that decision before this Court.

2. With respect to the rest of the claims made during the period starting 1996, and which is the subject of dispute before me, I find the material evidence to be as follows:

(a) **Letter dated 8th August, 1996 from the Chairman of the College to the Respondent.** (Page 47, Supplementary Record). It says, in part: “..... I also refer to the discussions on the matter (emoluments package) during the Board of Governors meeting held on 27th June, 1996. During the said board meeting, a sub-committee was appointed to deal with the matter.....”

(b) **Special Sub-Committee Meeting Minutes** of 30th July, 1996 (Page 51 – Supplementary Record) Minutes show that as per Board of Governors decision, the Sub-Committee would review Mr. Sio’s package; the package was adjusted; distribution of package to be subject to approval by the Chairman.

(c) **Minutes of the Meeting of Board of Governor’s held on 21st November, 1996** (Page 43, Supplementary Record) which states:

“The Chairman reported that a decision concerning emoluments had been made in the case of the Principal The Board accepted this proposal”

(d) **Letter dated 8th August, 1996 from the Chairman to the Financial Controller**, referring to the Board of Governor's meeting, and directing him to adjust the Respondent's emoluments. With regard to overseas passage, the letter said:

“College to pay Mrs. Sio's expenses in respect of travel to annual EUHOFA Congress.”

Based on the sequence of events outlined above, I am satisfied, **on a balance of probability**, that the Board approved the Respondent's revised package, including the travel expenses of Mrs. Sio. I have noted the Tribunal's reservation and doubt “whether the revision was ever approved by the Board before it took effect on 1st July, 1996.” This doubt was expressed because of the failure by either party to produce the Minutes of the full Board meeting approving the terms of the Respondent's package. Nonetheless, the Tribunal relied on other evidence, especially the Chairman's letter of 8th August, 1996 to the Financial Controller advising him of the revised terms, including travel expenses of Mrs. Sio. The Tribunal came to the following conclusion:

“In the above premises, we accept the Appellants submission that his revised terms were effected through the recommendations of the approved special committee appointed by the Board of Governors. Therefore the enjoyment of the overseas passage allowance by Mrs. Sio for the period 1996 to 2002 was procedurally effected in view of the foregoing findings.”

Having re-evaluated the evidence before the Tribunal, I am satisfied that it came to the correct decision. As I indicated before, the test to be applied is the balance of probability test. Therefore, on balance, I conclude, as did the Tribunal that:

(i) the Respondent was entitled to rely on the Chairman's letter to him of 8th August, 1996 stating that the Board of Governors had constituted a Sub-Committee.

(ii) the Sub-Committee did approve the package;

(iii) the Board approved the same

(iv) the Chairman directed the Financial Controller to pay the claims.

I would also note that the Respondent sufficiently discharged the burden of proof required of him. He is not expected to produce Board Minutes. He had no control over them, nor over the “internal mechanism” of approvals or process. He is entitled to rely on the representations made to him by the senior-most person on the Board – its Chairman, and its agent, and spokesman. And that is exactly what he did. He cannot now be faulted for not ensuring, or not producing Board resolution. With great respect, that is not a duty that can be imposed on him, but on the Chairman.

Accordingly, and for reasons outlined, this Appeal is dismissed with costs.

Dated and delivered at Nairobi this 27th day of March, 2007.

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ALNASHIR VISRAM

JUDGE



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