



**Dawood v Muthaiga Travel Limited (Cause 1014 of 2016)
[2024] KEELRC 2328 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2328 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1014 OF 2016
K OCHARO, J
SEPTEMBER 26, 2024**

BETWEEN

FEMINA DAWOOD CLAIMANT

AND

MUTHAIGA TRAVEL LIMITED RESPONDENT

JUDGMENT

1. Contending that at all material times, she was an employee as a Branch Manager, and Director, of the Respondent company, whose, employment was terminated unfairly, and removal from directorship was effected unlawfully and illegally, the Claimant sued the Respondent herein seeking;
 - I. A declaration and a finding the retention of her dues after constructive dismissal from office as a branch manager and removal from office as a director was unlawful and illegal and an order for immediate payment of the said dues.
 - II. A declaration and a finding that the demand for immediate handover of all office equipment, documents, keys and all company property amounted to constructive dismissal as the Claimant could no longer perform any duties as per her contract as a branch Manager.
 - III. Interest on illegally withheld dues at commercial rates from the date they fell due till full payment.
 - IV. A maximum of 12 [twelve] months compensation for unlawful termination of the Claimant’s employment as a branch Manager through constructive dismissal.
 - V. A certificate of service.
 - VI. An order as to costs of this suit in favour of the Claimant
 - VII. Interest on 1,2, 4 and 6 at court rates from date of judgment till payment in full;



VIII. Any such further order as it may deem fit to grant.

2. Through its Defence and Counterclaim, the Respondent resisted the Claimant's claim asserting that her employment was not terminated but came to an end as she absconded duty and therefore not entitled to the reliefs sought, and that through the Claimant's actions, it suffered loss and damages, thus;

- i. Loss of profit for six [6] years..... 30,000,000.
 - ii. Loss of goodwill33, 000,000.
 - iii. Payment of one month's salary in lieu of notice.....
291,980.00
 - iv. Emoluments including salary paid by the Respondent without knowledge that she had deserted duty and unilaterally terminated her employmentKShs. 1,200,00.00
 - v. Additional cost of relocating and setting up a new office premises..... KShs. 12, 957,063.00
 - vi. Loss of Claimant's business relationship or clientele that the Respondent converted or transferred to her said company..... KShs. 3,000,000.
- Total..... KShs. 80,449,052.00.

And sought the sums from the Claimant under the Counterclaim.

3. In conformity with the procedure rules, the Claimant filed a reply to defence and counterclaim dated 2nd December 2016, reiterating the contents of her statement of claim, and denying in toto the Respondent's claim as set out in the Counterclaim.

The Claimant's Case

4. At the hearing, the Claimant adopted her witness statement filed herein dated 27th May 2016 as part of her evidence in chief and tendered in evidence the documents that she filed under the list of documents of the even date as her documentary evidence.
5. It was the Claimant's case that she first came into the employment of the Respondent on the 1st of April 1998, as a Branch Manager, under the terms and conditions that were set out in her letter of appointment dated 31st March, 1998. Her starting salary was KShs. 60,000 per month, plus the allowances that were specifically set out therein, amounting to KShs. 10,000. The amount was progressively reviewed upwards to the extent that at the time of her dismissal as Branch Manager and removal as Director, she was earning KShs. 296, 314.
6. The Claimant asserted that on or about the 1st April 1998, she acquired 5% of the Respondent company's shares, and made a director of the company and as such director became entitled to payment of commissions and profits as agreed between her and her co-director, Klarissa Wills.
7. She further stated that on 13th March 2013, she intimated her intention to tender her resignation from her position as a Branch Manager, and consequently requested a meeting for deliberations on the same and the issue of terminal dues that could ensue, with the other Director. The meeting was set for 18th March 2013, but the same didn't take place.
8. On the 19th of March 2013, she received an undated letter which falsely accused her that she had been working against the interests of the Respondent. In the letter, the Respondent purported to accept



- her resignation, a resignation which she had never tendered. The letter intimated that the resignation could be effective end of April 2013, and required her to proceed on forced leave and to immediately hand over all office equipment and work-related information.
9. She further stated that on the 8th of April 2013, she received another letter from the Respondent, falsely claiming that her handover was not properly done.
 10. The Claimant asserted that the demand for immediate handover of all office equipment, documents, keys and all company property amounted to constructive dismissal of her from employment as she could no longer perform her duties as the Branch Manager.
 11. The Claimant further asserted that the letter dated 19th March 2013 indicated that her dues and other administrative issues would be dealt with at a time suitable to all. The same was never done despite her unceasing requests for the same.
 12. On 26th March 2013, she received a notice of an extraordinary meeting of the company, the notice set out only one agenda, her removal from office as a director.
 13. She asserted that after the constructive dismissal, and removal from office, as the Branch Manager and Director, respectively, she frantically sought to settle her dues. Still, the Respondent failed and or neglected to pay. Further, the retention of her dues is illegal, unfair, and unlawful. The failure and neglect are even though the terminal dues were acknowledged by the Respondent as owed.
 14. The Respondent has never indicated any reasonable and justified reason for the retention of her terminal dues.
 15. Cross-examined by Counsel for the Respondent, the Claimant stated that she only served as a Branch Manager and Director of the Respondent. She never served in the capacity of Executive Director.
 16. The Claimant stated that she at all material times knew the commencing and end dates of the lease agreement between the Landlord of the premises that housed the Branch at which she was a Manager, and the Respondent. In fact, she executed the agreement on behalf of the Respondent as its Director. Further, she was a signatory to the Respondent's Bank accounts.
 17. The Claimant asserted that there were never Board meetings. Her co-director used to make decisions without involving her as she had the majority shares. Though she was the Branch Manager of the Respondent's ACK branch, she could not tell how much the Respondent was making from the branch as the financial records, were being kept by the Co-Director. The Respondent's finances were mainly from tours and ticket sales. The Respondent's Fair View branch was doing very well. It was earning the Respondent profits.
 18. The Claimant testified that she registered her own company after the Co-director removed her from the directorship of the Respondent Company. When she was incorporating the company, she gave Fair View Hotel as the company's physical address.
 19. The Claimant asserted that she didn't at any given time act against the interest of the Respondent. Further, the Respondent withheld her dues purporting that she had been acting against its interests.
 20. The Claimant further asserted that the Landlord was in constant communication with the owner of the Respondent company. As such, she didn't personally seek to have the lease for the Fair View Hotel office renewed.
 21. The Claimant asserted that her company entered into a tenancy agreement for its offices when the Landlord made an offer in June 2013. This was way after the termination of her employment. She



never discussed the lease in favour of her newly incorporated company during the currency of the Respondent's lease for the same space.

22. In her further testimony under cross-examination, the Claimant stated that to the best of her knowledge, the Respondent didn't suffer any losses as a result of losing the Fair View Hotel office, as its corporate clients followed it to the new offices. Often, corporate clients are more interested in the services offered than in the offices occupied.
23. The Fair View branch was small. It couldn't raise the alleged thirty million Kenya Shillings. As such, the allegation that she caused the Respondent to lose the said amount is unfounded. She contended further that she didn't make the Respondent sustain a goodwill loss of Kshs. 33,000,000. The Respondent moved with all its customers to the Muthaiga offices, they cannot be heard to state that goodwill was prejudiced, therefore.
24. The Claimant further testified that even before the Fair View lease expired, the Respondent had decided that it was to surrender the space due to declining income. The Respondent had decided to move to a bigger office, as such, the relocation expense was to be incurred anyway.
25. She further stated that the Fair View Branch had a very insignificant contribution to the business of her Company, Travel Wise Ltd. Her decision to take the office was not influenced by a desire to hold captive the Respondent's market.
26. The business records relevant to the instant matter have always been in the custody of the Respondent's Auditors.

The Respondent's case

27. The Respondent presented one witness to testify on its behalf, Ms. Klarissa Wills, its Managing Director. At trial, the witness adopted her witness statement dated 2nd February 2022 as her evidence in chief and tendered the documents filed herein by the Respondent as its documentary evidence.
28. The witness asserted that the Claimant was an Executive Director of the Respondent Company at all material times. Contrary to her position, the termination of her employment was lawful.
29. The witness stated that any acts of misfeasance or breach of trust by a Director whether executive or non-executive against their company is prohibited by law. The Claimant acted in a manner that breached the trust.
30. She further stated that there is no doubt even from the Claimant's pleadings that the termination of her employment was at her behest when she communicated her intention to resign on 13th March 2013. Further, after the communication, it dawned on the Respondent that the purported resignation was part of or a culmination of an unlawful scheme by her to commit various acts of misfeasance or breach of trust against the Respondent.
31. The Respondent had been operating business from one of its branches, which was situated at Fairview Hotel for fifteen years under an initial lease of six [6] years which was later renewed on various occasions. At all material times, the Claimant knew how strategic, valuable and important the branch was to the Respondent. She knew that the lease was to expire on 30th April 2013, but in breach of her primary duty, to engage the landlord on the renewal of the lease and retention of the office premises as a source of revenue for the Respondent.
32. In breach of trust, and abuse, or taking advantage, of her position, and knowledge of the pending expiry of the lease, she took advantage and negotiated with the landlord to take over the office premises



from 1st May 2013 to carry out the same business as the Respondent under the name TravelWise Kenya Limited.

33. The witness further stated that as revealed by the CR12., the Claimant incorporated the above-mentioned company on 22nd April 2013. In the process of incorporating the company, she used the Respondent's physical address as its registered office. This was without first obtaining consent from the Respondent.
34. The witness asserted that due to the Claimant's unlawful actions that were in breach of trust, the Respondent lost an opportunity to renew or obtain another lease of the premises after 30th April 2013 and lost the office as a source of revenue for its business. The Claimant was aware that the office was a source of profit for the Respondent amounting to not less than KShs. 5,000,000 annually. The business income ceased on 30th April 2013 when the Claimant's Company took over the office premises and the business.
35. The witness contended that the moment the Claimant decided to act in breach of trust against the Respondent by taking advantage of the Respondent's property, its confidential trading information and its business opportunity, for her benefit to the detriment of the Respondent, she thereby unilaterally terminated her employment with the Respondent.
36. She further argued that it would be unfair and unjust for the Respondent to be compelled to pay the Claimant any emoluments for the period when she was scheming and acting against the interest of the Respondent and causing financial loss to the Respondent. She cannot be allowed to benefit from her unlawful acts.
37. The Claimant should be made to compensate the Respondent for the loss that the Respondent suffered as a result of her actions. The Respondent's counterclaim should be allowed.
38. The Claimant unlawfully terminated her employment with the Respondent.
She is liable to pay the Respondent notice pay of KShs. 291, 989, being one month's salary.
39. The Claimant pretended to be in the Respondent's employment and continued drawing a salary for six [6] months, while at the same time, she was promoting the interests of her company, to the prejudice of the Respondent company. In the circumstances, she was not entitled to earn from the latter. She is liable to refund the emoluments drawn during the period.
40. Due to the takeover of the office space by the Claimant's company, the Respondent was forced to relocate operations from Fairview Hotel to another building. The process of relocation to and setting up, the new office costed the Respondent KShs. 12, 957,063.00. This expense can be discerned from the general ledger transactions document tendered in evidence.
41. The witness urged the Court to consider the Respondent's audited accounts for the two years ending 31st March 2012 and 31st March 2013 and note that it generated income of KShs. 114, 444,883 in 2013 which increased to KShs. 133, 396,075.00 in 2012 and drastically dropped to KShs. 105, 313,878 in 2013.
42. She stated further that the company's profit grew from KShs. 29,072,800.00 in 2011 to KShs. 42,316,001 in 2012 and drastically dropped to KShs—9,536.00 in 2013.
43. She asserted that the drastic drop in business and profits resulted from the loss of business from the Fairview Hotel branch where the Claimant had a captive market which market the Claimant too away.



44. Cross-examined by Counsel for the Claimant, the witness testified that she was the founder of the Respondent Company and has been its Managing Director since 1998. In practice whenever the Respondent wanted to terminate the employment of any of its employees, it could issue a termination notice to such employee. Further, it could settle all his or her entitlements before his or her exit.
45. The Claimant gave notice of intention to resign. He was therefore not entitled to the notice. Pressed further under the cross-examination, the witness stated that the Claimant didn't resign and that according to her witness statement, the Respondent terminated her employment.
46. She testified further that the Claimant was the Respondent's Branch Manager/ Executive Director. However, she admitted that the Respondent didn't tender as evidence a document to demonstrate that the Claimant was at some point appointed to the position of Executive Director. The Claimant served the Respondent for 15 years. The Respondent didn't have a job description for the position she was serving in.
47. The witness stated that they issued the Claimant with a letter accepting her resignation. In the acceptance letter, the Respondent gave reasons why it was accepting her resignation.
48. The Respondent did not carry out any disciplinary proceedings against her.
49. At separation the Claimant was paid part of her terminal dues. Not fully because of the damage she caused the Respondent Company.
50. The witness acknowledged that the Claimant was entitled to KShs. 350,000 being Director's fees. However, the amount was withheld pending a resolution of the Fair View Branch issue.
51. The Respondent's accounts department rejected the Claimant's claim for entertainment and mileage allowances for lack of supporting receipts. The Claimant wrote an email explaining that receipts had been presented. This notwithstanding, the claim was still rejected as the receipts presented were after two months of the alleged expenditure.
52. However, under further cross-examination the witness testified that there were correspondences between the Respondent and the Claimant on the mileage claim and that apparently there was confusion on the part of the accounts department. Should the Court find to be legally entitled, the Respondent will pay her the allowance.
53. The admitted that the Claimant is entitled to KShs. 165,000 as the balance of her commissions for the period up to the end of September 2012.
54. Testifying on the Claimant's claim for commissions in the sum of KShs.880,076.75, for October 2012-March 2013, the witness admitted that the sum is owed to the Claimant. Indeed, she [the witness] wrote an email to that effect.
55. Cross-examined further on the Claim for bad debts and discounts, the witness stated that she was not given any documents demonstrating the Claimant's entitlement to the relief.
56. Under her contract, the Claimant was entitled to annual salary increments. However, she did not receive the same. She didn't ask for it. The Claimant is not entitled to the relief sought in relation thereto.
57. She further denied that the Claimant was entitled to 5% [KShs. 1,700,000] made by the Nairobi office.
58. The witness testified that the Respondent is unable to fathom what informed the Claimant's claim for USD 4000. All that she knows is that the Claimant at one point had requested that her bonuses be



computed at 50% instead of 5%, and in response to the request she [the witness] made a representation that when the Claimant could eventually purchase the Respondent Company, the amount would be discounted against the purchase price. The sale didn't sail through.

59. The witness stated that true, the Claimant made a demand for her entitlements. She wrote her indicating that the demands were wrong. She suggested that they subject themselves to an arbitrator for a resolution on the disagreement on the Claimant's entitlements but the Claimant refused to turn up for the arbitration meeting. However, the Respondent has not produced any document to show that the Claimant refused the proposal for the engagement of an arbitrator.
60. The witness testified further that the Claimant's claim under the head leave days, is correct. However, under the same tongue asserted that she was not certain of how many earned but uncompensated leave days were outstanding in favour of the Claimant.
61. The witness stated that the Claimant was not paid severance pay, as under the law it was not a benefit that could be available to her. Payment of severance pay was at the discretion of the Respondent company. This is why two employees, Irene Kingori and Rosemary earned severance pay, not the Claimant.
62. The counterclaim for the loss of KShs. 30 million suffered by the Respondent flows from the audited accounts. The losses resulted from the loss of the Fair View Hotel Branch.
63. Questioned on the audit report, the witness stated, first, that the report is in respect of the period that ended on 31st March 2013, when the office in issue was still under the Respondent and its profits good. Second, from the report, one can't identify, and link income streams to the various offices specifically.
64. The witness testified that the Respondent closed its ACCK branch when the lease for the space expired. It wanted to continue operating from the Fair View Hotel, only to be informed by the Landlord that the Claimant had taken the office. Further, the Respondent did not present a resolution to the court, to show that it had expressed a desire to continue with the lease.
65. The witness stated that it was the responsibility of the Managing Director to pursue renewal of the lease. Unfortunately, she and the other Director were out of the Country. In this circumstance, the Claimant could have executed the lease contract.
66. The counterclaim for the goodwill sum could be justified by separate accounts for the Fair View Hotel Branch, which accounts, the Respondent didn't place before the Court.

Submissions by the Parties

67. Pursuant to the directions of this Court, the parties filed their written submissions and had the chance to orally highlight the same on the same on 2nd November 2023. I have carefully considered the same.

Analysis and Determination

68. I have carefully read the pleadings, the evidence and submissions by the parties, and the following issues emerge for determination;
 - i. Whether this Court has the jurisdiction to render itself on this matter.
 - ii. Was the Claimant's employment terminated by the Respondent?
 - iii. If the answer to [ii] above is in the affirmative, was the termination unfair?
 - iv. Whether the Claimant is entitled to the reliefs sought.



- v. Whether the Respondent's Counterclaim is merited.

Whether this Court has Jurisdiction to render itself on this matter.

69. The Respondent argued that this Court has no jurisdiction to entertain the Claimant's case. It has been said time and again that jurisdiction is everything, and as such where there is none, the court has to down its tools and proceed no further. See *Owners of Motor Vessel "Lilian S" vs- Caltex Oil [Kenya] Ltd [1989]* eKLR. For this reason, I must first deal with the issue.
70. The Respondent submitted that the controversy before this Court for interrogation and resolution, in the circumstances of the matters falls not under the realm of the *Employment Act*, but the *Companies Act*. It is contended that the controversy relates to a relationship between a Director and her Company and not an employee-employer relationship.
71. The Claimant's Memorandum of Claim expressly averred that she was first employed as a Branch Manager of the Respondent's Fair View office on the 31st March 1998. She later became a Director of the Respondent Company when she became a shareholder courtesy of the purchase of some of its shares.
72. Keenly looking at the Claimant's pleadings, evidence and submissions, and the Respondent's witness's evidence under cross-examination, in my view, there comes a clear revelation that; the Claimant discharged two roles in the Respondent Company, and the two roles came to an end distinctly.
73. This Court notes that on the 8th of March 2013, the Respondent wrote to the Claimant and stated in part;
- "Further to your resignation as a Branch Manager and our acceptance of the same pursuant to our letter which was handed over to you on 19th March 2013 at the Company's offices at ACK Garden House, 5th Floor, a copy which is attached herewith for your ease of reference, I write to confirm that as part of the handing over process we have received from you the following....."
74. Undeniably, the Respondent treated the Claimant as its employee and I hold rightfully so since her contract of employment as the Branch Manager was not terminated in any manner known in law or at all, before the alleged date of resignation.
75. It is not in dispute that on the 26th of March 2013, the Respondent's Secretary issued a notice to the shareholders and Directors for an extra general meeting on the 24th of April 2013. Among the agenda for the meeting was the removal of the Claimant as Director of the Respondent Company. Through a notice dated 26th March 2013, signed by the Respondent's witness, the resolution for the removal of the Claimant as such Director was communicated.
76. The foregoing premises speak unequivocally to the fact that the Claimant at all material times held two positions in the Respondent company, one as an employee and the other as a Director. If it was the intention of the parties that upon becoming a Director, the Claimant was to cease discharging the role of an employee, nothing could have been easier than the parties to so expressly state. This Court hasn't lost sight of the fact that the Respondent in its pleadings and its witness's statement described the Claimant's position in the Respondent Enterprise as that of Executive Director. However, it failed to place forth any evidence to demonstrate her appointment to this alleged position and rebut the Claimant's position that she held two positions.



77. As a result, I am unpersuaded by the Respondent's submission that the doctrine of estoppel and election militates against the Claimant. Its reliance on the decision in the case of *Kenya Chemical and Allied Worker's Union vs Bamburi Cement Limited, Civil Appeal No. 25 of 2016*, on the doctrines doesn't relevantly fortify the Respondent's point.
78. In the upshot, I find that those matters that relate to the Claimant's position as an employee of the Respondent and the separation between the Respondent and her, are matters that fall under the realm of the *Employment Act*, and consequently, this Court has jurisdiction over them pursuant to the provisions of Section 12 of the *Employment and Labour Relations Court Act*. For those that relate to the Claimant's position as Director of the Respondent Company, this Court doesn't have the requisite jurisdiction to interrogate and render itself on them.

Was the Claimant's Employment terminated by the Respondent?

79. There was no common cause, on how the parties separated in their employer-employee relationship. The Respondent contended that it didn't terminate the Claimant's employment rather her employment came to an end at her initiative, by resigning. The Claimant was of the position that the Respondent unlawfully and unfairly terminated her employment.
80. Neither the *Employment Act*, 2007 nor any statute speaks elaborately to termination at the initiative of the employee by resignation which in a host of circumstances is deemed by the law as termination by mutual agreement. In the instant case, one thing is clear in my mind, the Claimant on the 13th of March 2013, expressed her intention to resign as Branch Manager. She also expressed a specific date when the resignation was to take effect. Her pleadings and correspondence are clear on this.
81. In my view, a resignation need not take a specific form, it can even be formal. All that is vital is an expression of the intention to resign from employment and specificity when the same takes effect. This much the Claimant did. She contended that her employment was terminated through the letter dated 19th March 2013. In my view, and in the circumstances of the matter, the letter was not a termination letter but one that accepted her resignation. It is imperative to state that where an employee has expressed his or her intention to resign, it doesn't become obligatory for the employer to issue an acceptance letter.
82. From the documents placed before this Court by the parties, it is evident that after the Claimant expressed her intention to resign and the Respondent's acceptance, the Parties got into the phase of negotiating the dues payable to her.
83. By reason of the premises, the inescapable conclusion is that the Claimant's employment was determined through her initiative [resignation]. The termination was not at the initiative of the Respondent as her employer. Therefore, I am not persuaded by the Claimant's submissions.

Was the termination unfair?

84. Having found as I have hereinabove that the Claimant's employment was not terminated by the Respondent as alleged, it becomes unnecessary to expend this Court's precious time to interrogate and decide on this issue.

Whether the Claimant is entitled to the reliefs sought.

85. The natural consequence of this Court's finding that the Claimant resigned from her employment, is that her claim for unfair termination fails. The reliefs sought based on the alleged unfair termination of employment cannot be availed to the Claimant, as a result.



86. Further, as I have found that this Court lacks jurisdiction to entertain the claim that falls under the province of Company law, those reliefs sought on the strength of the Directorship position of the Claimant cannot be granted. Their consideration is for a different forum as dictated by the [Companies Act](#).
87. The Claimant sought inter alia an order directing the Respondent to issue her with a certificate of service. Time and again this Court has held that under section 51 of the [Employment Act, 2007](#), a certificate of service is a guaranteed statutory entitlement to any employee who has separated from his or her employer. It matters not how the separation occurred. As a result, I find the Respondent's argument that it couldn't issue a certificate of service to an employee who defrauded it, most unfounded.
88. The Claimant further sought against the Respondent payment of service pay. The Respondent didn't contend that this terminal benefit was paid to her. However, it firmly asserted that she wasn't entitled to the same, under the law. This firm position notwithstanding, the Respondent didn't state either in its pleadings or evidence or submissions, the prohibiting law. In my view, the Claimant's employment was terminable by notice under the provisions of Section 35 of the [Employment Act, 2007](#). As such, the section wholly applied to the employer-employee relationship that was between her and the Respondent. I think the Respondent was blurred by the misdescription it gave the Claimant's relationship with it, from seeing this position of the law.
89. Section 35[5] of the [Employment Act](#) provides for service pay. However, it is imperative to state that sub-section 6 excludes some categories of employees from asserting that they are entitled to the benefit. The Respondent didn't contend and prove that the Claimant fell under any of the categories. There is no material before this court from which it can be concluded that she is not entitled to the relief. She is entitled to service pay. Undeniably, she worked for the Respondent as a Branch Manager for 15 years.
90. Under Section 28 of the [Employment Act](#), employees are entitled to annual leave as of right. The employer has a corresponding burden to ensure that the right is available to the employee. The Claimant specifically averred in her pleadings that at separation, she had 41 earned but unutilized leave days. This Court notes that in her evidence under cross-examination, the Respondent's witness admitted that the Claimant was entitled to compensation for unutilized leave days, only that she couldn't tell for how many days. Under section 74 of the [Employment Act](#), the employer is enjoined to keep employee records. Faced with a claim like the instant one, one could expect a reason employer as such a keeper of records to demonstrate either that the Claimant didn't have unutilized leave days or that if they were, she was compensated for the same. The Respondent failed to place forth evidence to discount the Claimant's that she was entitled to compensation for 41 leave days that were earned but untaken.
91. This Court has not lost sight of the fact that in her email dated 29th May 2013, the Respondent's witness did acknowledge that the Claimant had outstanding leave days. She hoped that one Josephine was to compute the exact number of the days.
92. By reason of this premises, I hold that the Claimant is entitled to compensation for the 41 earned but unutilized leave days.
93. Undeniably, under her contract of employment, the Claimant was entitled to entertainment allowance and mileage allowance. She claimed that for 2012-2013, she was not paid an entertainment allowance to the tune of KShs. 262,783. The Respondent's witness in her evidence under cross-examination admitted that the allowance was an entitlement for the Claimant, however, the same couldn't be paid as the auditor rejected her claim, on account that it was not supported with receipts. However, I am



not lost on the fact that pressed further she admitted that the Claimant forwarded receipts though belatedly. The Respondent didn't place material before me, either in the form of a policy or practice document, that could cause the Claimant to forfeit entitled entertainment allowance on account of late submission of receipts. I hold that she is entitled to the relief sought under this head.

94. The Respondent's witness admitted that the Claimant is entitled to mileage allowance. She didn't challenge her entitlement to the sum sought of KShs. 85,400.00 for December 2011- March 2012 and KShs. 254,450.00 for April 2012-March 2013. I hereby award her the same.

95. Independent of the claim for unfair termination, the Claimant asserted that she was entitled to a monthly salary increment. Further, between 2008-2011, she didn't receive any. She claims that she was entitled to an increase of KShs. 15000 per month. On salary increment, the appointment letter stated;

“Salary Review

Your salary will be reviewed every year, depending on merit and performance.”

I find considerable difficulty in understanding the basis for the Claimant's assertion that she was entitled to a monthly salary increase of KShs. 15000 for the period stated, in light of this stipulation of the appointment letter.

96. Further, considering the period [2008-2011], the claim relates to, it should be rejected as given the provisions of Section 90 of the Employment Act, the same was initiated out of time.

97. All the other reliefs sought by the Claimant are declined save for those that I have expressly granted, and stated to have been admitted, hereinabove, for the reason, either they relate to the claim for unfair termination or the directorship relationship of the Claimant with the Respondent.

Whether the Respondent's Counterclaim is merited.

98. The Respondent's Counterclaim was predicated on the principal fact that the Claimant was at all material times its Executive Director. While serving in the said position, she breached her trust and confidence. In my view, therefore, the Respondent's claim isn't an employment claim. The subject matter of the Counterclaim can only be properly litigated under the Companies Act, as a commercial dispute. Consequently, I hold that this Court lacks the jurisdiction to entertain the Counterclaim. It is hereby struck out with costs.

99. Assuming I am wrong on the foreseen conclusion, I will still dismiss the Counterclaim. The reliefs sought by the Respondent fall under the category of special damages. They needed to be specifically proved. I fear they were not.

100. In the upshot, Judgement is hereby entered for the Claimant in the following terms;

I. The Respondent is directed to issue her a certificate of service within 30 days of this Judgment.

II. The Respondent shall pay her;

A. Compensation for 41 earned but unutilized leave days, KShs. 404, 962.50.

B. Service pay 15 days' salary for every year worked KShs. 2,222,355.

C. Unpaid Mileage allowance, KShs. 339, 850.

D. Unpaid entertainment allowance, KShs. 262,783. 20.

E. The Admitted sum of Kshs. 880, 076.75 as Commissions. See paragraph 54 above.



- i. Interest at Court rates on the awarded sums in [a], [b], [c] and [d] above from the date of filing this suit, till full payment.
- ii. Interest on [e] above at court rates from the date when it fell due, 30th March 2013, till full payment.
- iii. The Respondent's Counterclaim is struck out.
- iv. Costs of this suit, and the struck-out Counterclaim, be shouldered by the Respondent.

READ SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024.

OCHARO KEBIRA

JUDGE.

In Presence of

Mr. Washika for the Claimant

Mr. Otieno for Oyatsi the for the Respondent.

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

