

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E816 OF 2021**

**STEPHEN MWANGI MAINA.....**

**CLAIMANT**

**VERSUS**

**YANTAI WELWORTH INTERNATIONAL TRADE CO. LTD**

**CAREPLUS LTD**

**LIU ZHIGANG.....**

**.....RESPONDENTS**

**JUDGMENT**

**Introduction**

1. For determination is the Claimant's Statement of Claim dated 30<sup>th</sup> September, 2021, and filed on 1<sup>st</sup> October, 2021. Under the claim, the Claimant seeks the following reliefs as against the Respondents:-

- i. A declaration that the summary dismissal of the Claimant's employment is unlawful, unfair, and wrongful;
- ii. A declaration that the termination of the Claimant's employment without according him a fair hearing and lacking proper fair administrative procedure was unfair, and consequently void.
- iii. A declaration that the Respondents acted unfairly, unreasonably, irrationally, and disregarded the service of the Claimant by failing to pay his salary and dues,

and wrongfully terminating his employment on victimization and discrimination.

- iv. A declaration that the termination was unlawful, untimely, and an order that the Claimant be paid his dues and benefits hereunder.
  - v. Special damages in the sum of Kshs.10,471, 429.00\_\_\_
  - vi. a certificate of service
  - vii. general damages
  - viii. costs
2. The Respondent filed a Response to the Statement of Claim dated 7<sup>th</sup> February, 2022, and later amended on 24<sup>th</sup> June, 2022, denying the Claimant's averments.
  3. The Claimant's case was heard on 22<sup>nd</sup> November, 2024, when the Claimant (CW1) and Harrison Ndungire Muchina (CW2) testified in support of the Claimant's case. The witnesses adopted their witness statement, and the Claimant produced his list and bundle of documents as exhibits in the matter.
  4. The Respondent's case was heard on 29<sup>th</sup> April, 2025, with the Respondent's witness, Mr. Liu Zhigang, also the 3<sup>rd</sup> Respondent herein (RW1), testifying on behalf of the Respondent. He adopted his witness statement and produced his list and bundle of documents in support of the Respondent's case.
  5. Submissions were filed for both parties, and have been duly considered.

### **The Claimant's case**

6. The Claimant's case is that he was initially engaged by the 2<sup>nd</sup> Respondent in 2017 on a part time basis to assist the Managing Director, Mr. Muchina, with accounting tasks and training an accountant.
7. He avers that his attendances increased from one day per week to two days, with an allowance of Kshs.25,000, and that as the workload grew, he was retained to work five days per week, and his allowance was progressively raised to Kshs.40,000 and later Kshs.60,000 to cover transport and related expenses.
8. The Claimant further avers that in 2017, a former watchman, Mr. Wycliffe, became a representative of the 1st and 3rd Respondents within the 2<sup>nd</sup> Respondent's company, tasked with safeguarding their interests and forwarding documentation to China. It is his case that the said representative was paid Kshs.40,000 through the 1<sup>st</sup> Respondent's account. The Claimant states that between late 2017 or early 2018, Mr. Wycliffe ceased performing accounting duties and declined a data clerk role.
9. It is the Claimant's case that in May 2019, Mr. Eric Onkoba was appointed to replace Mr. Wycliffe as the representative of the 1st and 3<sup>rd</sup> Respondents, and that his duties included assisting with accounting entries and serving as an in-house pharmacist.

10. The Claimant avers that Eric's compensation included a salary of Kshs.140,000, a weekly transport allowance of Kshs.3,000, and 10 percent of the Respondents' profits. It is his case that he received salary and benefits from both the 1st and 2nd Respondents.
11. The Claimant further states that in 2019, the 3rd Respondent, both a Director of Careplus Limited and the investor representative of the 1st Respondent, visited Kenya to review Careplus Limited's progress. He avers that on 20th November 2019, he appointed the Claimant as the financial manager and representative of the 1st Respondent, though no written contract or salary terms were provided.
12. The Claimant avers that this appointment replaced the earlier roles held by Mr. Wycliffe and Mr. Eric Onkoba, and he was made a signatory to Careplus Limited's bank accounts alongside the Managing Director, effectively removing Eric Onkoba from that position.
13. The Claimant states that he continued to perform his original duties for the 2<sup>nd</sup> Respondent while simultaneously acting as the representative of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. He avers that he established and implemented a financial accounting system for the 1<sup>st</sup> Respondent and handled wide ranging responsibilities, including financial management, cheque signing, audits, bank transactions, training Chinese accountants, and assisting the 3<sup>rd</sup> Respondent with personal

and administrative matters such as travel arrangements, asset purchases, and statutory compliance.

14. It is his case that although he worked for 22 months in this capacity, he was never given a contract of service and was never paid any salary by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents for his role as their financial manager and representative.

15. The Claimant states that he was never allowed to take annual leave during his employment and was not compensated for the leave days he did not take. He avers that the Respondents failed to inform him of his entitlement to 21 days of fully paid annual leave, failed to allow him to go on annual leave after completing 12 months of service, failed to pay him Kshs.200,000, equivalent to one month's salary, for unused leave days for 2019-2020, and failed to pay him Kshs.171,429 for 18 unused leave days for 2020-2021.

16. The Claimant states that, because he managed financial records including account reconciliation, cheque signing, and handling withdrawals, he confirms that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' local representatives were regularly paid salaries and other benefits by the 1<sup>st</sup> Respondent.

17. He further avers that the 1<sup>st</sup> Respondent hired two accountants, Xiu Yiheng and Yu Yi, and deployed them to the Kenyan branch, where they shared premises with the 2<sup>nd</sup> Respondent, to be trained by him. It is his case that

their role included representing the 1st and 3rd Respondents in Kenya and safeguarding their interests in the 2nd Respondent's company.

18. The Claimant further states that all Chinese accountants and staff working for or trained by him were fully remunerated by the 1st Respondent both in Kenya and in China, in respect of salaries, upkeep, house allowance, visa renewal costs, and use of a new vehicle with fuel and maintenance covered. He further avers that they were also permitted to access funds directly from the 1<sup>st</sup> Respondent's accounts or through the 2<sup>nd</sup> Respondent whenever necessary.

19. The Claimant states that the Respondents failed to meet their obligations regarding his housing and transport benefits. He avers that the Respondents did not provide him with reasonable housing accommodation near the workplace, or pay him a housing allowance, nor provide him with transport either by way of a company vehicle or a weekly transport allowance.

20. The Claimant states that the 1<sup>st</sup> Respondent violated his constitutional and statutory rights by denying him fair labour practices, fair remuneration, reasonable working conditions, and lawful administrative action as protected under Articles 41 and 47 of the Constitution. He further states that his termination breached Sections 35, 41, 45, and 46 of the Employment Act, as he was not issued a sufficient notice period, nor was he paid in lieu of notice. The

Claimant avers that he was not afforded a fair hearing and was dismissed without any valid or justified ground.

21. The Claimant further states that he faced open bias and discrimination, and that each time he raised concerns about not being paid or compensated for his work as the financial manager and representative of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, the 3<sup>rd</sup> Respondent consistently dismissed or avoided addressing the issue, showing a deliberate refusal to discuss or acknowledge his rightful salary and benefits.

22. The Claimant states that in August 2020, the 3<sup>rd</sup> Respondent expressed a loss of confidence in the Kenyan operations, later returning to Kenya with the aim of ousting the 2<sup>nd</sup> Respondent's managing director, Mr. Muchina, a plan the Claimant refused to support. He avers that in September 2021, the 3<sup>rd</sup> Respondent returned and urgently transferred USD 100,000 to the 1<sup>st</sup> Respondent's accounts.

23. It is his case that he instructed his lawyers to issue a demand letter on 22<sup>nd</sup> September 2021, prompting a response on 27<sup>th</sup> September 2021 in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acknowledged his role as finance manager and investor representative, confirmed his assigned duties, admitted his repeated attempts to secure his unpaid salary, and formally communicated his termination.

24. The Claimant asserts that he faithfully performed all his duties under the employment contract and that his termination was carried out without any grounds, justifiable

cause, or adherence to the rules of natural justice, the Constitution, or the Employment Act. He maintains that, as a permanent employee, the 1<sup>st</sup> Respondent was required to comply with sections 41 and 43 of the Employment Act before terminating his employment, and that the Respondent's failure to follow these mandatory procedures rendered the termination unlawful.

25. The Claimant further argues that the Respondents acted outside the scope of the law, violating Section 45 of the Employment Act by failing to observe fair procedure, making the dismissal untimely, unjust, and legally invalid.

26. In his oral testimony, the Claimant told this court that he was paid an upkeep allowance by the 2<sup>nd</sup> Respondent and was to be paid a salary by the 1<sup>st</sup> Respondent.

27. On cross-examination the Claimant stated that he had not produced prove that he was employed by the 2<sup>nd</sup> Respondent or that he was being paid Kshs.40,000.

28. It is his testimony that the minutes of 21<sup>st</sup> November 2019 show that he was appointed a financial manager and representative of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He avers that he worked for 2 years without being paid a salary and that he raised the issue with the 3<sup>rd</sup> Respondent on WeChat.

29. The Claimant clarified that the 1<sup>st</sup> Respondent was a supplier of the 2<sup>nd</sup> Respondent, and that the 1<sup>st</sup> Respondent had in him a physical presence since it is based in China. It is his

position that he was allocated duties by the 3<sup>rd</sup> Respondent on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Respondents as he was a director of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

30. The Claimant prays that the Court find that the Respondents deliberately violated the Constitution, the Employment Act, the Regulation of Wages and Conditions of Employment Act, and the documents governing his appointment.

31. The Claimant prays that his claim be allowed.

### **The Respondent's case**

32. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that the Claimant was employed by the 2<sup>nd</sup> Respondent and that his remuneration was increased to Kshs.60,000 following his promotion to Financial Manager.

33. The Respondents state that the meeting of 20<sup>th</sup> November 2019 indeed took place, but assert that the 3<sup>rd</sup> Respondent attended as a director and majority shareholder of the 2<sup>nd</sup> Respondent, and not as a representative of the 1<sup>st</sup> Respondent. They state further that the meeting was solely to set internal management guidelines, and not to create an employment relationship with the Claimant.

34. They contend that the Claimant's appointment as Financial Manager was a promotion from his previous accountant position, and therefore no written terms of engagement were required.

35. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deny that the Claimant acted on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, maintaining that all duties he performed were within the scope of his employment with the 2<sup>nd</sup> Respondent. It is their case that his appointment as a signatory was in his capacity as the 2<sup>nd</sup> Respondent's Finance Manager and deny any obligation to provide him with remuneration from the 3<sup>rd</sup> Respondent.

36. The Respondents further state that visiting Chinese staff were sent by the 1<sup>st</sup> Respondent, a supplier, and any support provided to them was a business courtesy, not employment benefits. They further deny that the Claimant was entitled to the same treatment as these visitors, and assert that there is no connection between such courtesies and his employment.

37. The Respondents further dispute the Claimant's claims regarding meetings, emails, and other events, asserting that these were either internal management matters of the 2<sup>nd</sup> Respondent or the Claimant's personal opinion. They deny any violation of the Claimant's constitutional rights, maintain that any dispute is purely contractual under the Employment Act, and reject allegations of unpaid salary or improper termination.

38. The 2<sup>nd</sup> Respondent avers that the Claimant's employment was lawfully terminated due to gross misconduct, specifically threats, harassment, and intimidation of the 3<sup>rd</sup> Respondent, which persisted even after prior warnings.

39. The 2<sup>nd</sup> Respondent states that the Claimant's employment was lawfully terminated due to gross misconduct, alleging that he repeatedly accessed the Respondent's premises, even in the presence of the former managing director, and deliberately destroyed financial information stored on the 2<sup>nd</sup> Respondent's computers.
40. RW1 told the court on cross-examination that the Claimant was employed by the 2<sup>nd</sup> Respondent, and that the 1<sup>st</sup> Respondent is not registered in Kenya.
41. It is RW1's further evidence that the Claimant was doing reports for the 1<sup>st</sup> Respondent since it was delivering goods to the 2<sup>nd</sup> Respondent. He confirmed further that the Claimant prepared financial reports for the 1<sup>st</sup> Respondent and answered accounting queries from the 1<sup>st</sup> Respondent.
42. He confirmed further that two Chinese nationals came to Kenya to learn from the Claimant, and were paid by the 1<sup>st</sup> Respondent. He confirmed that the Claimant was appointed as the finance manager.
43. RW1 confirmed that the Claimant was a signatory to the 2<sup>nd</sup> Respondent's accounts. It is his position that the Claimant left work without notice and that he could not be traced. He stated that the Respondents wrote to the Claimant's lawyer to inform him that the Claimant was terminated for having absconded duty. RW1 told the court that he did not have the letter they wrote to the Claimant before the court.

44. RW1 confirmed that he did not issue the Claimant with a certificate of service.

45. The Respondents pray that the Claimant's claim be dismissed with costs.

### **Analysis & Determination**

46. The following issues arise for determination:-

- i. Whether the Claimant was an employee of the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents
- ii. Whether the Claimant was unfairly terminated
- iii. Whether he is entitled to the reliefs sought

### **Whether the Claimant was an employee of the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents**

47. The Claimant's position is that he was initially employed by the 2<sup>nd</sup> Respondent and later appointed in a representative capacity by the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents. The first issue, therefore, is to determine who exactly the Claimant worked for.

48. The evidence before the court indicates that the Claimant performed extensive financial management duties, trained staff, and acted as a signatory on accounts. The Respondents, however, deny that the Claimant had any contractual relationship with the 1<sup>st</sup> Respondent, asserting that all the duties that he performed, he did so within the scope of his employment with the 2<sup>nd</sup> Respondent.

49. In determining the existence or lack thereof of an employment relationship, courts have emphasized substance over form. In ***Kenya Airways Ltd v. Eric Ombongi [2005] eKLR***, it was held that the actual control, payment, and authority exercised are critical in establishing an employment relationship.

50. The Claimant herein performed continuous duties for the 2<sup>nd</sup> Respondent and some work on behalf of the 1<sup>st</sup> Respondent. There is, however, no direct evidence of a contractual obligation by the 1<sup>st</sup> Respondent to pay him.

51. The Claimant has thus, in my considered view, not established an employment relationship between himself and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

52. Conversely, it is not disputed that the Claimant was employed by the 2<sup>nd</sup> Respondent, first in an acting capacity and later, as a finance manager on a monthly pay of Kshs.60,000/.

53. It therefore follows that any claim for salary or benefits from the 1<sup>st</sup> Respondent is unsupported as there is no proof of an agreement or direct payment arrangement between the Claimant and the 1<sup>st</sup> Respondent.

54. The Claimant can only therefore claim as against the 2<sup>nd</sup> Respondent with whom he had an employer/employee relationship.

### **Whether the Claimant was unfairly terminated**

55. The Claimant contends that his termination was unfair and unlawful, on the premise that he was not issued with any notice, not accorded a fair hearing, and that procedures under Sections 41, 43, 45, and 46 of the Employment Act were ignored. It is his position that he was dismissed without justification.

56. On their part, the Respondents contend that the Claimant left work without notice and could not be traced, and on this account, the 2<sup>nd</sup> Respondent wrote to the Claimant's lawyer to inform him that the Claimant was terminated for having absconded duty.

57. For starters, the Respondents' assertion that the Claimant absconded from duty, leading to his termination, is not supported by any evidence. RW1, in his oral testimony, told the court that they wrote to the Claimant's lawyer concerning his disappearance from work, he did not have that particular letter before the court. In **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR**, it was held that it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is therefore not enough for an employer to simply state that an employee has deserted duty.

58. The 2<sup>nd</sup> Respondent being the employer, has thus in my view, not led evidence to show that the Claimant absconded duty, and the alleged abscondment cannot therefore be a valid ground for his termination.

59. It is also evident that the 2<sup>nd</sup> Respondent did not at all purport to have accorded the Claimant a fair process as required under the law. Indeed, as correctly submitted by the Claimant, no notice of termination was issued prior to his termination, and nor was he accorded a fair hearing or a hearing at all.

60. In ***Mary Mutanu Mwendwa v Ayuda [2013] eKLR***, the Court held that the Employment Act has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer, and is entitled to have a representative present.

61. Further, in ***Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR*** the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

62. In light of the foregoing, I find and hold that the 2<sup>nd</sup> Respondent, being the Claimant's employer, was in breach of Section 41 of the Employment Act and Article 47 of the Constitution for not affording the Claimant fair process.

63.The Claimant's termination is procedurally unfair, and so I hold.

64.On substantive justification, the Respondents alleged that the Claimant was terminated for gross misconduct. Further, the Respondents, through the evidence of the 3<sup>rd</sup> Respondent, contend that the specifics of the gross misconduct include threats, harassment, and destruction of financial data belonging to the Respondents.

65.Again, the Respondents have not in any way shown that the Claimant threatened or harassed the 3<sup>rd</sup> Respondent or that he destroyed any data.

66.The Court of Appeal in ***Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR*** held:-

***"..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions."***

67.In this case, no evidence at all was led to prove the allegations of misconduct against the Claimant. The termination is therefore similarly not based on fair, valid, and justified reasons, hence substantively unfair.

68. In the end, I find the Claimant's termination both procedurally and substantively unlawful and unfair, and so I hold.

**Whether the Claimant is entitled to the reliefs sought**

69. The court has held the Claimant's termination unfair on account of both procedure and substantive justification. This holding is specifically made as against the 2<sup>nd</sup> Respondent who was the Claimant's employer.

70. The claim for unpaid salaries sought against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents fail with the finding that an employer-employee relationship has not been established.

71. The Claimant's prayer for damages for unfair termination is merited the termination having been found unlawful and unfair. The court notes that the 2<sup>nd</sup> Respondent employed the Claimant and proceeded to overload him with roles from a different entity without compensating him for the seemingly extra work. On this account, I find and hold that the Claimant has justified an award of maximum compensation and which is hereby awarded.

72. On the claim for annual leave, the Claimant alleges denial of annual leave and associated compensation. Section 28 of the Employment Act provides that employees are entitled to 21 days of annual leave, fully paid, after 12 months of service.

73. The Claimant worked continuously and was not granted leave or compensated in lieu thereof. The 2nd Respondent has not provided evidence that leave was granted or payments made, creating a prima facie case for leave compensation. This aligns with the principles in ***Peter Kamau v. Kenya Ports Authority [2011] eKLR***, where non-compensated leave was recognized as a valid claim.

74. The claim for two years of leave not taken therefore succeeds.

75. On the claim for house allowance, the Claimant has not led evidence to show that the monthly payment did not include a housing allowance, and the claim therefore fails.

76. The claim in respect of service pay is not controverted. The 2<sup>nd</sup> Respondent has also not shown that it deducted and remitted NSSF contributions in respect of the Claimant or that he was a member of a pension scheme or that he benefited from a gratuity payment.

77. The claim for service pay thus succeeds and the Claimant is awarded 15 days' pay for the one completed year of service since he served in the position for 22 months.

78. The Claimant further claims damages for alleged violation of Articles 41 and 47 of the Constitution regarding fair labour practices, reasonable working conditions, and fair administrative action. These claims have in my view not

been proven, separate from the claim for unfair termination where compensation has already issued.

79. In whole, the Claimant's claim succeeds as against the 2<sup>nd</sup> Respondent and orders granted as hereunder:-

- a) A declaration that the Claimant's termination by the 2<sup>nd</sup> Respondent is unlawful and unfair
- b) An order that the 2<sup>nd</sup> Respondent shall pay the Claimant 12 months' salary as compensation for the unfair termination at Ksh.720,000/-
- c) One month' salary in lieu of notice at Kshs.60,000/-
- d) Service pay of at Kshs.30,000/-
- e) Payment on account of annual leave Kshs.120,000/-
- f) That the 2<sup>nd</sup> Respondent shall issue the Claimant with a certificate of service within 14 days of this judgment.
- g) The claims against the 1st and 3rd Respondents are dismissed
- h) The 2<sup>nd</sup> Respondent shall bear the costs of the suit.

80. Judgment accordingly.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2025.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Gathiru present for the Claimant

N/A for the Respondent

Ms. Esther S- C/A

ORIGINAL