

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 201 OF 2016

THOMAS MUTUNGA KITHUNZI.....CLAIMANT
VERSUS
FORMAX INSURANCE BROKERS LIMITED.....RESPONDENT

JUDGMENT

By a memorandum of claim dated 12th February 2016, the Claimant seeks against the respondent the following reliefs: -

- a) Special damages in the sum of Ksh.10,911,500 being loss of income, medical cover and NSSF contributions for 14 years and 2 months
- b) Exemplary and punitive damages for breach of contract, unlawful actions/termination of employment and breach of the Constitution.
- c) General damages for psychological trauma.
- d) Costs and interest

Claimant's case

The Claimant (CW1) testified under oath and adopted witness statement dated 5th September 2022 as his evidence in chief and produced exhibits '1' to '9' in support of the case.

The Claimant's case is that he was employed by the Respondent between 1st March 2007 and 13th February 2013 as an Assistant Manager vide a Letter of Appointment dated 19th February 2007. He was later promoted to a Technical Manager. The Claimant earned a monthly gross salary of Ksh

Ks. 43,250 and a medical cover of Ksh. 15,000 per year with effect from 1st January 2008.

The Claimant states that his troubles started on 4th February 2013 when he applied for annual leave for a period of 11 days effective 6th February 2013. The Respondent, through its then Executive Director, initially approved the leave request with a proposed commencement date of 11th February 2013, instead of 6th February 2013 as requested by the Claimant.

On learning that the Claimant intended to vie for elective office on 4th March 2013, the Respondent reversed its earlier approval for the Claimant to proceed on his annual leave, and directed the Claimant to resign or be sacked. The Claimant protested arguing that running for an elective post was not a breach of the terms of the contract of employment with the Respondent, and that it was his Constitutional right under Article 38(c) of the Constitution. He refused to resign.

The Claimant testified that the Respondent terminated his employment on 13th February 2013 by a letter of the same date, without any justifiable cause or valid reason, warning or due process as required by law. Further, the Claimant complains that he was condemned unheard in breach of the rules of natural justice. According to the Claimant, the termination of his employment was in breach of his contract and the disciplinary procedures was therefore unlawful, wrongful and unfair, the only motivation being his intention to vie for an elective position which information he had disclosed during the company's Christmas party.

The Claimant denies reporting late to the office and/or absenting himself from duty as alleged in paragraph 2 of the termination letter dated 13th February 2013. He points out that no prior complaint or warning was issued to him for those alleged offences, and neither was he served with a notice to show cause setting out the charges/allegations of absenteeism. This issue was raised for the first time in the termination letter dated 13th February 2013.

In light of the foregoing, the Claimant claims compensation for the loss and damage he suffered and continues to suffer as a result of the Respondent's decision to terminate his services, and specifically prays for the reliefs set out in the statement of claim.

Respondent's case

The Respondent called Asad Malak (RW1) in defence of the case who adopted a witness statement dated 16/9/22 as his evidence in chief and also produced exhibits '1' to '11' in support of the defence case. The Respondent admits that the Claimant was its employee, having been appointed as an Assistant Manager on 1st March 2007, and his appointment confirmed in June 2007 following a 3-month probation period. After some time, the Claimant was promoted to the position of Technical Manager

RW1 testified that the Claimant began arriving to work late and absenting himself from the office without notice. Sometimes the Claimant reported to work in the morning then sneaked out in the afternoon, and sometimes he

failed to report altogether and only addressed his absence with the Respondent once he resumed duty. It is the Respondent's case that the Claimant also developed a habit of lying to the Respondent regarding his whereabouts during working hours, where he would claim to have visited particular clients, only for the Respondent, upon querying the client, to find out that he never did so.

That the Claimant's conduct became an issue when it began affecting the day-to-day operations of the Respondent, as well as the effective provision of services by the Respondent to its clients, particularly since the Respondent operates in the insurance industry where a good rapport with clients, built upon the availability of staff and their ability to effectively and efficiently respond to client's needs sometimes in emergencies as and when they arise, is fundamental.

The Respondent testified that the Claimant's non-availability at work risked the Respondent's reputation, as he was responsible for underwriting insurance claims as they arose, as well as general administration and marketing for the Respondent. RW1 added that the Claimant also caused general confusion and chaos among other employees who were forced to take up his work duties.

The Respondent admitted that the Claimant applied for his annual leave on 4th February 2013 and informed the Respondent that he wished for the same to commence on 6th February 2013.

At the time of the Claimant's application for leave, the Respondent had a lot of urgent matters that needed to be addressed immediately and was not in a position to allow the Claimant to go on leave at the time requested.

The Respondent communicated its position to the Claimant, and drew his attention to his letter of appointment which provided that leave was to be taken at such time as the Respondent and the Claimant would agree. Nonetheless, the Claimant disregarded the Respondent's instructions for him to wait to go on leave and stopped reporting to work.

Upon discovering that the Claimant's sustained absenteeism from work was because he was running for elective office, the Respondent classified the absenteeism as a breach of the Claimant's employment contract which provided that the Claimant would devote the whole of his time to the interest of the Respondent and, further that he would not be personally involved in any other business other than that of the Respondent.

The Respondent was further aggrieved by the Claimant's failure to obtain written consent from the Respondent to engage in elections, despite the provision in the Claimant's contract of employment, which he duly executed, that he must obtain written consent from the Respondent to engage in any other business or concern other than that stipulated in his contract. The Respondent complains that the Claimant ran his election campaign secretly for several years, using the Respondent company's time and resources.

The Claimant was as result issued with a 30-day notice of termination of his employment. That, the Claimant did not serve the notice, however, the Respondent in good faith remitted the Claimant's dues in full, including pay for the thirty (30) days' notice period. The Claimant acknowledged receipt of his terminal dues in the sum of Ksh. 70,238,00, accepting them in full and final settlement of his claims against the Respondent.

The Respondent adds that it had warned the Claimant about his frequent absenteeism and dismal performance during his performance appraisals and salary reviews, as captured in his appraisal forms, and was therefore justified to terminate his employment, since he refused and/or failed to improve his performance at work and report to work regularly. That the suit lacks merit and it be dismissed with costs.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are: -

- (a) Whether the claimant fundamentally breached his contract of employment by embarking on seeking an elective position while still in the employ of the respondent and without leave of absence
- (b) Whether the Claimant is entitled to the reliefs sought

The claimant has admitted that he had left his place of work to campaign for an elective position having been denied leave of absence by the employer. The Claimant asserted that he had a right to exercise his constitutional right to vie for an elective position under Article 38 of the

constitution of Kenya 2010. The Court is satisfied that the Claimant had been severally warned by the Respondent following a pattern of late coming and absenteeism. The Respondent was correct in attributing this change of behaviour to early campaigns by the Claimant in preparation for the elective season. The Claimant had indeed announced his intention early during a Christmas Office Party.

The contract of employment between the Claimant and respondent before court expressly prohibited the Claimant to be employed in any capacity connected to any business other than with the respondent during the tenure of his employment.

It is not in dispute that the Claimant was entitled to 21 working days annual leave. However, that leave had to be taken at such time as the company and the Claimant agreed in terms of the said contract of employment.

Clearly the Claimant fundamentally breached the contract of employment by embarking on elective politics in a manner that undermined his discipline and performance at the work place. The open defiance of instructions to await a suitable agreed time to go on leave and embarking on election campaigns fundamentally breached his contract of employment and the Respondent was entitled to repudiate the same by issuing the Claimant one month notice of termination in accordance with the said contract.

The claimant was paid all terminal dues upon separation and the court finds that the Claimant is not entitled to any more benefits arising from his employment.

Accordingly, the suit lacks merit and is dismissed with no orders as to costs.

Dated at Nairobi this 14th day of April 2026



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this 22nd day of April 2026

Dr. Gakeri J.

JUDGE

Appearance:

Mr. Kipng'eno for Claimant

Mr. Ali for Respondent

Court Asst. Mr. Kemboi