



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

(ON Makau J on 30th April, 2026)

CAUSE NO. E398 OF 2024

DEBRA **ANDITI**
AJWANG.....CLAIMANT

-VERSUS-

DEVELOPMENT **BANK** **OF** **KENYA**
LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 22nd May 2024, the Claimant sued the Respondent for unlawful termination of her employment contract and sought the following reliefs:-

a) An order to reinstate the Claimant back and formal confirmation to the position she held prior

to the illegal, unlawful and irregular termination of her employment by the Respondent.

b) Payment of all her pending salary and allowances since her termination from employment to the time of her reinstatement.

c) An alternative of twelve (12) month's salary for unlawful termination.

d) One month's salary payment in lieu of notice.

e) One month's salary for earned leave.

f) Gratuity earned for the year worked.

g) General damages.

h) Costs of the suit together with interest at court rates.

i) Any other relief that this Honourable Court may deem just, fit and fair to grant.

2. The Respondent opposed the Claim vide a Memorandum of Response dated 24th June 2024 whereby it averred that the termination was done lawfully during probation period. Therefore it prayed for the suit to be dismissed with costs.

Facts

3. The Claimant was employed by the Respondent as Company Secretary and Head of Legal for a renewable term of five (5) years with effect from 13th March 2023. Her salary was Kshs.

538,000 per month. The first six months were probationary period during which either party could terminate the contract by serving 14 days notice or paying the other salary in lieu of the notice. After the probation period the contract was terminable by one month notice or payment of salary in lieu of notice.

4. The Claimant's probation was to end on 14th September 2023 and on 5th September 2023 Respondent wrote an email to the Claimant asking her to prepare an end of Probation Report including her Balance Score Card (BSC) for discussion with the Chief Executive Officer (CEO). The Claimant emailed the report on 23rd October 2023, after the expiry of the probation period.
5. The supervisor considered the report and recommended that the Claimant's appointment should not be confirmed. The Board met in November 2023 and decided to terminate Claimants services as advised by her supervisor. The decision was communicates by the termination letter dated

19th December 2023, more than 9 months from the date of appointment.

6. The main question for considering is whether, in the circumstances of the case, the Claimant was still serving under probationary contract when the termination occurred. To answer that question, both sides tendered evidence and thereafter filed written submissions.

Evidence

7. The Claimant testified as CW1 and adopted her written statement dated 22nd May 2024 as evidence in chief. She further produced Ten (10) documents as exhibits. She then clarified that her probation period was six months but she exceeded that period by three (3) months before receiving a termination letter, talking of two weeks notice.
8. She contended that a notice of two weeks was not applicable to her because her probation period had already lapsed. She further averred that she was not accorded any disciplinary hearing before the termination. She further averred that she had performed her duties diligently and that the only show

cause letter she received 26th September 2023 was in respect of a professional training from 18th September 2023. However, she maintained that she had exercised her mandate under the Human Resource Policy and had notified her supervisor and the Chief Executive Officer.

9. On cross examination, she contended that her delay to submit her end of probation did not stop the Respondent from making a decision on her confirmation. She contended that the Human Resource Manager (her supervisor) was the one responsible for preparing the end of probation request under the Bank Policy. She maintained that her appointment was automatically confirmed after expiry of the probation period as she never received any letter stating otherwise.
10. As regards the show cause letter dated 18th September 2023, she admitted that she had not sought permission. However, she clarified that she had notified her supervisor that she would be attending a training.

11. She admitted she is now a corporate secretary but clarified that when she filed the suit seeking reinstatement, she was not in employment.
12. Respondent's Human Resource Manager, Dorcas Namwendwa, testified as RW1. She adopted her written statement dated 11th March 2025 as evidence in chief and produced 14 documents as exhibits. She then added that it is a practice in the bank that the Human Resource Manager sends an email to senior managers on probation to alert them that the probation is about to end and ask them to prepare end of probation report. The officer is given a period of 2 weeks to do so. She further stated that the Respondent's Board meets 4 times a year.
13. On cross examination, she confirmed that the preparation of end of probation report is just a practice and not provided in the Human Resource Policy. She admitted that the email produced, dated 5th September 2023 left out the position that contained the request for preparation of the end of

probation report. She contended that the Claimant was supposed to be appraised by the Chief Executive Officer.

14. She admitted that the Claimant worked for 9 months overshooting the probation period by three months. She admitted that during the said three months, the Claimant was assigned work and she was paid salary. She further admitted that the probation period was never extended in writing.
15. She confirmed that the Respondent's Board can be specifically arranged while others can be deferred. She did not produce the schedule for Board meetings but admitted that there was a Board meeting in September.
16. She contended that the Claimant was appraised by the Chief Executive Officer who was conversant with all the departments. She admitted that she had evidence to prove that the Claimant fell below targets in any area.
17. She admitted that the Claimant attended a training and she was served with a show cause letter. She admitted that

training was arranged by the Head of Departments and the Claimant was in charge of her department.

18. In re examination she maintained that the Board failed to discuss Claimant's end of probation report in September 2023 because she delayed the report upto October 2023. She contended that the Claimant never responded to her email dated 5th September 2023 and she never sought any clarification.
19. She clarified that no Head of Department can proceed on leave or training for 5 days before authorization by the Chief Executive Officer because there could be important issues to be addressed. Finally she reiterated that the Claimant was paid salary after lapse of probation because she worked and it was in accordance with the bank's practice.

Submissions

20. It was submitted for the Claimant the after expiry of Claimant's probation period. She converted to a permanent employee by operation of the law. For emphasis several court decision were cited including **Catherine Kathina**

**Kelly v. Likisonko Sacco Limited [2016] eKLR, Shigadi
Sinoya v. Autech System Limited [2017] eKLR and
Nancy Wanjiku Kamau v. Kevian Kenya Limited [2023]
KEELRC 627 (KLR)**

21. It was further submitted that the Claimant having converted to permanent employee the Respondent was bound by section 45 of the Employment Act, that prohibits termination of employment except for a valid reason and in accordance with fair procedure. Any allegation of poor performance was denied as no evidence of the same is on record. For emphasis, reliance was placed on **Abraham Gumba v. Kenya Medical Supplies Authority [2014] eKLR** where the court held that employer must adduce evidence to prove poor performance.
22. Besides, it was submitted that the Claimant was never accorded any hearing before the termination. Reliance was placed on **Kenfreight (EA) Limited v. Benson K. Nguti [2016] eKLR** where the Court of Appeal held that issuing a proper notice or payment of salary in lieu of notice did not

absolve the employer from the duty to accord the employee a hearing in the presence of another employee of his choice.

23. For reasons submitted above, the court was urged to award the prayers sought in the suit plus costs.

24. However, it was submitted for the Respondent that the Claimant was still on probation when the termination was done. It was submitted that, although the probation was for six months, the Claimant intentionally frustrated her appraisal process by providing her end of probation report more than one month after the Human Resource Officer notified her that the report was required as part of her evaluation before the confirmation.

25. For emphasis reliance was placed on **Njenga v. Kenya Women Finance Trust [2017] KECA 1144 (KLR)** where Court of Appeal noted that the employee was issued with appraisal forms at the completion of probation period and a filed to cooperate.

26. It was further submitted that the Respondent has sufficient grounds for terminating the Claimant's contract. She was

issued with a show cause letter dated 18th September 2023 for failure to report to work without express permissions from her supervisor, and failed to respond by close of business on 25th September 2023 as required. She then responded on 26th September 2023 contending that she was away on training.

27. It was further submitted that the Claimant presented her end of probation report and Balance Score Card (BSC) for discussion with the Chief Executive Officer and in November 2023 the Board considered it and advice of the Chief Executive Officer and resolved not to confirm the Claimant's appointment. It was also submitted that any reasonable employer could have terminated the employment for the same reasons. For emphasis reliance was placed on **Evans Kamadi Misango v. Barclays Bank of Kenya Limited [2015] eKLR** and **Danish Jalango & Another v. Amicabre Travel Services Limited [2014] eKLR**.

28. In view of the above matters, it was submitted that the Claimant is not entitled to the reliefs sought and as such the suit should be dismissed with costs.

Issues for determination and analysis

29. Having considered the pleadings, evidence and submissions from both sides, the following issues fell for determination:-

- a) Whether or not the Respondent terminated Claimant's contract of employment during the probation.
- b) Whether the termination was unfair and unlawful.
- c) Whether the Claimant is entitled to the reliefs sought

Probation contract

30. Clause 2 of the Claimant's Appointment letter dated 28th February 2023 provided as follows:-

“ Upon your appointment, you will be placed on a six months probation and during your probationary period of service, your employment may be terminated by either party with a notice of a fortnight, or payment of a fortnight's salary in lieu thereof. Thereafter, on confirmation in your

appointment, your employment may be terminated by either party at the expiration of one month's notice in writing or by the payment of one months salary in lieu of notice."

31. The above clause did not provide for end of probation appraisal and the procedure to be followed. However on 5th September 2023, the Claimant was notified by an email that her probation was about to end. The email produced by the Respondent did not say anything more but the Claimant admitted during Cross examination that the email also required him to prepare end of probation report. No timelines were indicated. RW1 admitted in evidence that the requirement for the preparation of the report was not legal or contractual but a practice within the Bank to facilitate appraisal to guide in deciding whether or not to confirm the appointment.

32. The Claimant did not prepare and submit the end of probation report until 23rd October 2023, about one month after the lapse of the probation period. I agree with the Respondent that the failure to prepare the said report might have frustrated the process of appraising her for confirmation. The question that

arises is what would a reasonable employer do in such circumstances.

33. In **Leah Shighadi Sinoya v. Autech System Limited**, Mbaru J held:-

“ The duty is upon the employer to call and advise the employee when the probation period has lapsed. Where an employer allows the same to pass without action, the employee stands confirmed into full employment with the due benefits.”

34. Mr. George Ogembo in his book, **Employment Law Guide for employers**, Revised Edition, opines that:-

“As an employee’s probation period comes to a close, the employer must elect either to confirm or terminate the employee’s probationary contract. If the employer does not act either way and the employee continues in service, the law presumes in favour of confirmation of the contract. The confirmation accrues by operation of the law, also referred to as constructive confirmation.”

35. I agree with Mbaru J and George Ogembo in their view about automatic or constructive confirmation where the employer fails to terminate relationship after the lapse of the probation period.

In the instant case, Clause 2 of the employment contract did not leave any room for extension of the probation service, meaning that unless termination was done, by either party the appointment of the Claimant was duly confirmed. Therefore the Respondent was prohibited by the law from terminating the contract unfairly.

36. Having carefully considered the facts of this and those in **Njenga v. Kenya Women Finance Trust**, cited by the Respondent, I find no similarity. In the said case the Claimant refused to cooperate in appraisal process which was expressly provided in the contract. Consequently, I am satisfied that the Claimant was not in probation when she was dismissed.

Unfair and unlawful termination

37. Section 45 (1) and (2) of the Employment Act provides that:-

“(1). No employer shall terminate the employment of an employee unfairly.

“(2) A termination of employment by an employer is unfair if the employer fails to prove-

a) That the reason for the termination is valid;

b) That the reason for the termination is a fair reason-

(i) Related to the employees conduct, capacity and compatibility; or

(ii) Based on the operational requirements of the employer; and

c) That the employment was terminated in accordance with fair procedure.”

38. The termination letter dated 19th December 2023 is copied below:-

“RE: TERMINATION OF APPOINTMENT ON PROBATION

Reference is made to your Letter of Appointment dated 28th February 2023, your discussion with Directors on 14th December 2023 and your meeting with the Governance and Human Resources Committee of the Board on 19th December 2023.

This is to convey the resolution of the Board of Directors as communicated to you during your meeting with the Governance and Human Resources Committee of the Board today, 19th December 2023, that you shall not be confirmed

in appointment as Company Secretary/Head of Legal.

Effective immediately, upon clearance and handover through the Head of Human Resources, the bank will pay your dues for days worked to-date and two (2) weeks salary in lieu of notice.

We take this opportunity to wish you the best in all your future endeavors

Your Faithfully.

Signed

JOHNSON KINITI

CHIEF EXECUTIVE OFFICER

Acknowledged

Signed by Debra Ajwang

Date: 19/12/2023.”

39. The letter purports to terminate probationary appointment and no reason is cited. It also refers to a meeting with the Directors on 14th December 2023 and another meeting on 19th December 2023 with the governance and Human Resource Committee. The agenda of the meeting was not disclosed and the court cannot assume it. Finally the letter

directed her to handover and clear with immediate effect. The letter offers to pay the Claimant two weeks salary in lieu of notice.

40. I have already made a finding of fact that the Claimant was no longer serving on probationary terms as at 19th December 2023 when the termination occurred. If the employer had reason not to confirm the Claimant's appointments, it ought to have done so on or before 13th September 2023 when the probation period expired. Therefore I find that the Respondent acted contrary to Section 45 (2) of the Act and that rendered the termination unfair and unlawful as the provision of Section 42 of the Act and the probationary terms of her contract of employment had ceased to apply to her.

Reliefs

41. The Claimants prayed for reinstatement with back pay from the date of termination. However the Claimant admitted in evidence that she found another job as corporate secretary after filing the suit. It follows that the prayer for reinstatement with back pay is now overtaken by evidents. I

will therefore award the alternative prayer of compensation for unfair termination plus salary in lieu of notice. Her contract provided for one months termination notice in writing or salary in lieu thereof.

42. Her gross salary was Kshs. 538,000 which I award less the Kshs. 269,000 paid as two weeks salary in lieu of notice. As regards compensation, the Claimant served for only 9 months and she did not contribute to the termination through misconduct. She expected to serve for five years before termination. The premature termination rendered her jobless for 5 months before filing the suit. Having considered the above factors, I award her one month gross salary as compensation for unfair termination being Kshs. 538,000.
43. The prayer for gratuity is also granted on pro rata basis because the termination before expiry of the contract was not to blame on the Claimant. Therefore I award her Kshs. $520000 \times 25\% \times 9/12 = \text{Kshs. } 97,500$.
44. The prayer for leave is also warranted but on pro rata basis also. Clause 5 of her contract provided 2.5 leave days per

month or 30 days per year. She served for 9 months and earned 22.5 leave days (Kshs. 52000 x 22/5/30) equaling to Kshs 390,000.

Conclusion

45. I have found that the termination of the Claimant's employment occurred after the lapse of the probation period. I have further found that the termination offended the mandatory provision of Section 45 of the employment Act and it was unfair. I have also found that the Claimant is entitled to the alternative prayers sought since the primary prayer of reinstatement with back pay was rendered moot when she secured another job as corporate secretary. Consequently, I enter Judgment for the Claimant against the Respondent as follows:-

- a) Notice.....Kshs. 269,000/-
- b) Compensation.....Kshs. 538,000/-
- c) Leave.....Kshs. 390,000/-
- d) Gratuity.....Kshs. 97,500/-
- Total.....Kshs. 1,294,000/-

e) The award is subject to statutory deductions.

f) The Claimant is awarded costs of the suit plus interest at court rates from the date of this Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 30TH DAY OF APRIL, 2026.

ONESMUS MAKAU

JUDGE.

Appearance

Were for Claimant

Kobia for Respondent