

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 173 OF 2020**

**(FORMERLY NAKURU ELRC NO. 77 OF 2019)**

**DANIEL GATHUTO ..... CLAIMANT**

**-VERSUS-**

**DAC AVIATION (EA) LIMITED ..... RESPONDENT**

**(BEFORE HON JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. The Claimant commenced this cause through Hari Gakinya & Co. Advocates by way of a statement of claim dated 9th November 2019 filed as Nakuru ELRC No. 77 of 2019. Subsequently, the cause was transferred to Nairobi and assigned the reference in the header above.
2. In the statement of claim the Claimant is seeking for various reliefs –
  - a. A declaration that the termination of the claimant’s employment was unlawful and unfair.*
  - b. Salary in lieu of notice plus twelve (12) months salary as compensation for unfair termination, severance pay at 15 days for nine (9) years.*

*c. Damages for breach of contract.*

*d. Interest thereon until payment in full.*

3. The statement of claim was accompanied with a verifying affidavit, a list of documents and copies of the listed documents and, a witness statement by the Claimant.
4. Though duly served as per the affidavit of service on record, the Respondent neither entered appearance nor filed a response/defence.

## **II. THE CLAIMANT'S CASE**

5. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence he adduced and, the written submissions by his counsel.
6. In the statement of claim, it is pleaded that the Claimant was engaged as an aviation engineer by the Respondent, a limited liability company, on 21st December 2009 at a monthly salary of Kshs168,260/=. It is pleaded that prior to 2nd March 2011 the Respondent was known as CMC THE DAC GROUP.
7. It is further pleaded that sometimes in 2014 the Claimant was seconded by the Respondent to Trident Aviation Limited (Trident) but the Respondent continued paying his monthly salary while Trident was only liable to pay to him allowances and other expenses in case the Claimant was assigned duties outside Kenya.
8. It is pleaded that from January 2018 the Respondent failed, refused, and or neglected to pay the Claimant's monthly salary

while the Claimant was out of the country in Indonesia on an assignment by Trident. Upon return to Kenya in August 2018, the Claimant visited the Respondent for an explanation on the salary arrears. To his dismay, he was informed that he had absconded duty since January 2018, yet, he was out of the country on an assignment by Trident based on the contract between the two companies that had seconded him to Trident.

9. It is further pleaded that the Respondent had not contacted him or Trident to inquire about his alleged absconding of duty.
10. It is further pleaded that on 3rd October 2018 the Claimant was called to the Respondent's office and handed over several letters which indicated that he had been terminated in January 2018 on account of his absconding duty, yet, none of those letters had been served upon him or upon Trident.
11. It is pleaded that the purported termination of the Claimant was unfair and unlawful both in substance and procedure and hence the Claimant pleaded that the court awards the prayers sought as set out in the introductory part of this judgment.
12. The cause came up in court for virtual hearing on 9th March 2026 when the Claimant and his counsel attended but the Respondent did not appear. After the court satisfied itself that the Respondent had been duly notified of the hearing date as per the affidavit of service on record, it was ordered for the matter to proceed for hearing *ex-parte* and undefended.

13. In his oral testimony in court, the Claimant stated that he is an aircraft engineer. He adopted his filed statement and produced his filed documents as exhibits 1 to 8. He further relied on his filed pleadings and prayed that judgment be entered in his favour as per the statement of claim.
14. Mr. Gakinya for the Claimant summed up the case in written submissions dated 12th March 2026. It is submitted that the Claimant was engaged by the Respondent vide an agreement dated 21st December 2009 and served locally and internationally before he was seconded to Trident but, his monthly salary was all along payable by the Respondent. It is further submitted that while on duty in Indonesia, sent out by Trident, the Claimant noticed that his salary from January 2018 was not credited into his bank account by the Respondent. In August 2018, when he returned to Kenya, the Claimant visited the Respondent but he was informed that he had been terminated in January 2018 for absconding duty.
15. It is submitted that at all material times the Respondent was the Claimant's employer and the tour of duty with Trident was on secondment by the Respondent on terms and conditions that clearly indicated that the Respondent remained his employer.
16. It is further submitted that the alleged termination was unfair and unlawful for lack of both substantive and procedural fairness. Counsel urged the court to relief and remedy the Claimant as pleaded in the statement of claim.

### **III. THE RESPONDENTS' CASE**

17. As stated in an earlier part of this judgment, the Respondent did not defend the claim notwithstanding that it was duly served.

### **VI. ISSUES FOR DETERMINATION**

18. The court has carefully and dutifully gone through the statement of claim, the attached documentary evidence, the oral evidence by the Claimant and, the submissions by his counsel.

Notwithstanding that the claim is undefended, it was upon the Claimant to prove his cause on a balance of probabilities.

19. The following issues commend themselves to the court for determination -

- a) *Did the Claimant prove an employment relationship between him and the Respondent and what were the terms and conditions thereof?*
- b) *Did the Respondent unfairly and unlawfully terminate the Claimant?*
- c) *Is the Claimant entitled to the reliefs sought?*
- d) *Who should bear the costs of the cause?*

### **IV. MERITS OF THE CAUSE**

20. In support of his allegation that he was an employee of the Respondent, the Claimant produced a contract agreement made on “Monday, December 21, 2009” between himself and CMC Aviation Limited. However, the copy of the agreement in the court file does not contain the page where the parties presumably

executed the same. The agreement was accompanied with an offer letter of even date addressed to the Claimant by the Managing Director of the said company. The Claimant accepted the offer and signed on 23rd December 2009. Both documents were produced in court as exhibits by the Claimant.

21. The Claimant was to earn a monthly gross salary of

Kshs168,260/=.

22. In a letter dated 1st July 2014, an entity in the name of DAC

Aviation (EA) Ltd (DAC), the Respondent herein, entered into an agreement with Trident Aviation Ltd wherein the latter was to engage the services of the former's Engineer Gathuto (the

Claimant) for the period starting from 12th July 2014 till further notice. This letter was produced in court as an exhibit by the

Claimant. Clause 2 of the said letter stated that ***“The Engineer (Daniel Gathuto) will provide these services to Trident Aviation Limited on behalf of DAC Aviation Ltd.”***

In return, Trident was to be invoiced a monthly fee of Kshs168,260/= payable in arrears at the end of each month for the period that the Claimant remained in secondment. It is important to note that this amount is equivalent to the gross monthly salary of the Claimant.

23. It is clear from the above letter that DAC remained the employer and only seconded the Claimant to Trident whereby the latter was to meet any extra pay, over and above the Kshs168,260/= paid to him by the DAC, to the Claimant when he worked outside Kenya including medical expenses and insurance.

24. However, the Respondent stopped paying to the Claimant his monthly salary as from January 2018 and the Claimant demanded payment of the same in a letter dated 23rd August 2018 upon his returning to Kenya from a tour of duty in Indonesia with Trident.
25. However, in a letter dated 3rd October 2018 the Respondent claimed that it had addressed two letters to the Claimant, dated 5th and 22nd January, 2018, the latter being a letter of termination due to Claimant's purported continued absence from work.
26. The letter of termination stated as follows –

*January 22, 2018*

*Daniel Gathuto*

*P.O. Box 16430*

*NAKURU.*

*Dear Daniel,*

*RE: TERMINATION OF EMPLOYMENT*

*Our letter dated January 05, 2018 refers. The letter sought for an explanation for your continued unauthorised absence from work. we note that you neither resumed your duties nor have you explained the reason for your continued, wilful and unauthorised absence.*

*You have without leave or other lawful cause, absented yourself from the place appointed for the performance of your work. You*

*are hereby informed that it is deemed that you have abandoned employment on your own accord.*

*You are therefore as of the date of this letter no longer considered an employee of DAC Aviation (EA) Ltd.*

*You are requested to arrange to handover your office identity card, keys and any other office property that you may have to your supervisor, Mr. Linden Whaule immediately.*

*Yours sincerely,*

*DAC Aviation (EA) Ltd.*

*Thom Pilgrim*

*MANAGING DIRECTOR*

27. It is the Claimant's case that he was served with the above two letters in August 2018 after returning from the tour of duty in Indonesia with Trident and upon visiting the office of the Respondent to inquire about his salary arrears. The court notes that the two letters are not on the letterhead of the Respondent unlike the contract agreement and the offer letter.
28. The foregoing summary raises one fundamental question. At what point did CMC Aviation Limited change its name to DAC Aviation (EA) Limited? Are the two companies one and the same?
29. Since the landmark case of ***Salmon V Salmon*** it has been consistently held that a limited liability company is a living legal entity with its own life with the capacity to sue and be sued, to

own property, and undertake many other ventures just like a natural person, only that it acts through natural persons such as directors, managers, employees, agents, servants, etc.

30. As stated elsewhere in this judgment, it was incumbent upon the Claimant to prove his entire claim on a balance of probabilities and the foregoing issue is fundamental to his claim. All that the Claimant needed to do was to avail to the court a search from the Registrar of Companies to establish and authenticate his claim that CMC Aviation Limited and DAC Aviation (EA) Limited are indeed one and the same legal entity. Based on the evidence and the case as presented by the Claimant, there is no evidence to demonstrate the foregoing. The court can only hear and determine cases based on the evidence availed to it except for matters that the court may take judicial notice.

31. The cause herein is not against CMC Aviation Limited, the employer of the Claimant as per the evidence availed in court. However, there is on record evidence to the effect that the Claimant was an employee of the named Respondent. There is a “pay advice for December 2017” and a letter of secondment of the Claimant to Trident by the Respondent dated 1st July 2014. In that letter of secondment, Trident was to reimburse to the Respondent Kshs168,260/= a month being the gross monthly salary that the Respondent continued paying to the Claimant during the period of secondment. The Claimant was indeed a signatory to the said letter of secondment and hence became party to the same. This is the

evidence that has saved the Claimant's case from a catastrophic ending.

32. It is unfortunate that the Respondent did not defend the cause to shed light on what exactly happened for it to deem the Claimant to have absconded duty notwithstanding that it was aware that he was on secondment with Trident. There is no evidence on record that the Claimant had been recalled from the secondment.
33. To the extent above, the Claimant proved that he was in employ of the Respondent herein at a gross monthly salary of Kshs168,260/=.
34. The evidence by the Claimant is that he was neither invited for a disciplinary hearing nor notified of his termination until eight months later when he returned to Kenya from a tour of duty in Indonesia with Trident. He only learnt of his termination when he visited the office of the Respondent in August 2018 to claim his salary arrears. The Respondent did not defend the cause and hence that evidence and assertion by the Claimant stands unchallenged.

## **V.RELIEFS**

35. Clearly and evidently, the termination of the Claimant was without notice or a hearing and was thus unfair and unlawful in contravention of **Article 41 of the Constitution** and **Sections 35, 42, & 43 of the Employment Act** and a declaration shall hence issue to that effect.

36. The Claimant was entitled to at least one month's notice or salary in lieu thereof before termination pursuant to **Section 35 of the Employment Act**. No notice was issued to him by the Respondent and he is thus awarded Kshs168,260/= being one month's gross salary in lieu of notice.

35. The Claimant is seeking for compensation equivalent to 12 months gross salary. The Claimant served the Respondent for over nine years yet he was terminated without due process. Considering the factors provided for under **Section 49 of the Employment Act** the court finds that a maximum award of compensation equivalent to 12 months' gross salary is reasonable and fair in the circumstances. The Respondent served no notice upon the Claimant, it denied him a hearing, and did not offer or pay any terminal dues to him. This was grossly unfair and unlawful towards an employee who had served for over nine years. The awarded compensation is calculated as  $Kshs168,260/ * 12 = Kshs2,019,120/=$

36. The Claimant is further seeking severance pay at 15 days' salary per year worked. It is important to note that the Claimant was not declared redundant under **Section 40 of the Employment Act** as to entitle him to severance pay. This claim is thus denied and dismissed. It would have been more appropriate for the Claimant to have claimed service pay in which event the court should have considered the same on merits.

37. The claimant also sought for damages for breach of contract that are neither supported with evidence nor quantified in the pleadings or the submissions by his counsel. The only breach of contract that has been pleaded and proved, as there is no evidence to the contrary, is the failure by the Respondent to pay the Claimant salary for the period from January to August, 2018. The Respondent is hereby ordered to pay the same at Kshs168,260/= \* 8 = 1,346,080/=.

## **VI.ORDERS**

25. The court issues orders that -

- a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was unfair and unlawful.***
- b) The Claimant is awarded the following –***
  - i. One month’s salary in lieu of notice ..... Kshs168,260/=***
  - ii. Compensation ..... Kshs2,019,120/=***
  - iii. Salary arrears ..... Kshs1,346,080/=***
  - Total ..... Kshs3,533,460/=***

***\*The total award is subject to statutory deductions.***
- c) Costs of the cause to the Claimant.***
- d) The awarded amount shall earn interest at court rates from the date of this judgment till payment in full.***

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2026.**

.....  
**DAVID NDERITU**  
**JUDGE**