



**Sang v Chemusian Farm Limited (Cause E251 of 2023)
[2025] KEELRC 412 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E251 OF 2023
SC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

DANIEL SANG CLAIMANT

AND

CHEMUSIAN FARM LIMITED RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 28th March 2023, the Claimant avers that he was employed by the Respondent on a three-year contract in the position of Finance Manager effective 1st April 2019 to 31st March 2022. According to the Claimant, he worked diligently registering a sterling professional and untainted return until he was unlawfully terminated from employment on 29th October 2020.
2. The Claimant has further averred that the Respondent’s action to terminate his employment was baseless, unlawful, unfair, malicious and in utter bad faith. He contends that there was no valid reason for the termination and that he was never issued with any notice or warning before the termination.
3. In view of the foregoing, the Claimant has asked the Court for an order declaring his termination, unfair, unlawful and unprocedural. He has further prayed for an award in the sum of Kshs 7,250,000/= being salary for the remainder of his contract term and compensatory damages for unfair termination.
4. The Respondent countered the Claim through its Memorandum of Response dated 30th May 2023. The Respondent avers that the Claimant was taken through a disciplinary hearing on 27th October 2020, following which the parties engaged in negotiations with a view of mutual separation. That the parties finally agreed on a mutual separation and voluntarily executed a Deed of Separation dated 11th February 2021.
5. Putting the Claimant to strict proof, the Respondent has denied summarily dismissing the Claimant and contends that the Claimant has not discharged the initial burden of proof of being unilaterally terminated from employment.



6. According to the Respondent, the Claimant was not unfairly terminated and his claims are unwarranted. To this end, the Respondent has asked the Court to dismiss the Claim with costs.
7. The matter proceeded for hearing on 17th October 2024 and 5th November 2024 during which both sides called oral evidence in support of their respective cases.

Claimant's Case

8. The Claimant testified in support of his case and at the outset, he sought to adopt his witness statement as well as his bundle of documents filed alongside his Statement of Claim to constitute his evidence in chief.
9. It was the Claimant's evidence that by a letter dated 27th October 2020, he was invited to attend a disciplinary hearing.
10. That on 27th October 2020 when he reported to work after his annual leave, he was called by the Chief Operations Officer, Mr. Kevin Kangogo, and given two options to select from, regarding his employment with the Respondent.
11. According to the Claimant, at the time of termination he was not informed of the reasons for termination nor was he given notice.
12. The Claimant further averred that the decision to terminate him from employment was unwarranted and unjustified considering that he had worked diligently for the Respondent without being issued with a warning or in breach of any of the company's policies and procedures.

Respondent's Case

13. The Respondent called oral evidence through, its Human Resource Officer, Mr. Geoffrey Nyongesa who equally adopted his witness statement and the Respondent's list and bundle of documents to constitute his evidence in chief.
14. It was RW1's testimony that on 15th September 2020, the Claimant was served with a Show Cause letter requiring his answer as regards various irregular transactions attributable to him. He was granted a period of 7 days to respond to the said Show Cause letter.
15. The Claimant was subsequently invited for a disciplinary hearing on 27th October 2020 which he attended and he was heard extensively as regards the allegations thereon.
16. That upon the conclusion of the disciplinary hearing, the Claimant and the Respondent engaged in negotiations with a view of mutual separation, and a mutual decision was arrived at that the Claimant would be paid salary up to the last working day, Gratuity, three month's salary in lieu of notice and leave days earned with the last working day agreed to be 30th October 2020.
17. On 29th October 2020, the Respondent communicated to the Claimant the details of the mutual agreement.
18. According to RW1, the Claimant was not summarily dismissed at all.
19. RW1 asked the Court to dismiss the suit with costs, the Claimant having failed to discharge his initial burden of proof and also having expressly agreed not to file a suit against the Respondent.



Submissions

20. On his part, the Claimant submitted that the suit is not pegged on the Deed of Separation but fully arises from the Respondent's breach of his fundamental rights, fair labour practices and employment contract.
21. The Claimant further posited that his exit from employment was unilaterally and maliciously instigated by the Respondent. That it was attracted by economic duress, intimidation, harassment and coercion.
22. According to the Claimant, the Agreement was unconscionably flawed and unlawful since it was characterized by duress, undue influence and due limitation of his employment rights. In the same vein, the Claimant submitted that the Agreement lacked mutuality, consent, voluntariness and good faith. It was his position that the amount of Kshs 1,106,677/= he received was in partial payment of his terminal dues earned from services that he had provided under his employment contract and was not a result of the conjured up Deed of Separation.
23. The Claimant further submitted that he was desperate to receive payment of his terminal dues and therefore signed the Deed of Separation with an element of economic duress. It was the Claimant's position that he did not have the economic wherewithal to wrestle/compete with the Respondent.
24. Referencing the case of *Riungu v Nation Media Group PLC (Employment and Labour Relations Cause 703 of 2019)* [2024] KEELRC 870 (KLR) (28 March 2024) (Judgment) the Respondent submitted that the burden lay on the Claimant to prove on a prima facie basis that he was unfairly terminated from his employment on the alleged day of 29th October 2020. In the Respondent's view, the Claimant has failed to discharge this legal burden and has failed to demonstrate that there was a termination at all.
25. The Respondent further submitted that the terms of the Deed of Separation were legally binding on the Claimant and he cannot now choose to renege on selected terms of the Agreement after taking full benefit of the separation dues.
26. Placing reliance on the case of *William Barasa Obutiti v Mumias Sugar Company Limited*, Civil Appeal No. 198 of 2004 (2006) eKLR, the Respondent submitted that the *Employment Act* has not laid any legal restrictions limiting the rights of employers and employees to enter into an agreement terminating the employment contract.
27. The Respondent's position was that there is no express averment alleging any act of coercion or undue influence in executing the Deed of Separation.
28. To this end, the Respondent urged the Court to find that the Claimant is indeed legally bound by all the terms of the Deed of Separation which was voluntarily negotiated and voluntarily executed by the parties. In the Respondent's view, the Claimant cannot be allowed to approbate and reprobate on terms which he deems favorable and other terms which he has again out of the blue, deemed unfavourable.
29. In support of its submissions, the Respondent invited the Court to consider the following precedents; *Wokabi v British American Tobacco Kenya Limited* (Cause 31 of 2016) [2022] KEELRC 12694 (KLR) (29 September 2022) (Judgment), *Gitaari v Kenya Hospital Association t/a The Nairobi Hospital* (Cause E898 of 2021) [2024] KEELRC 1846 (KLR) (17 July 2024) (Judgment) and *Beatrice Kananu Imathiu v British American Tobacco (K) Ltd* [2020] eKLR.



30. The Respondent further urged the Court to disregard the submissions on coercion, duress and unconscionability which in its view, were never pleaded hence it had no opportunity to respond or raise a defense.

Analysis and Determination

31. Upon evaluation of the issues arising from the pleadings, the evidentiary material on record and the rival submissions, the following issues stand out for determination by the Court:
- a. Whether the Respondent terminated the Claimant from employment;
 - b. Depending on (a) whether the Claimant's termination from employment was unfair and unlawful;
 - c. Whether the Deed of Separation dated 11th February 2021 is binding on the Claimant;
 - d. Is the Claimant entitled to the reliefs sought?

Whether the Respondent terminated the Claimant from employment

32. The parties herein have taken diametrically opposite positions with respect to the manner in which the employment relationship was severed. Whereas the Claimant has averred that he was unfairly terminated from employment, the Respondent holds that there was no termination from its end and that the employment relationship ended mutually upon execution of a Deed of Separation.
33. Section 47(5) of the *Employment Act* places the burden of proving that an unfair termination or wrongful dismissal has occurred on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
34. In the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal considered the import of Section 47(5) aforesaid and had this to say: -
- “So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
Underlined for emphasis
35. Fundamentally, the Claimant was required to prove in the first instance that there was termination of employment at the behest of the Respondent.
36. It is worth pointing out that despite the Claimant's assertions that he was terminated from employment by the Respondent, he did not exhibit a letter of termination or any document for that fact to prove as much.
37. The only document the Claimant appears to be clinging to is the letter dated 29th October 2020 referenced Notice: Contract Terms from the Respondent's General Manager.
38. The said letter dated 29th October 2020 made reference to a mutual agreement between the Claimant and the Respondent. As it turned out, the Claimant did not execute the said document. He admitted as much during cross-examination, explaining that the same fell outside what they had agreed with the Respondent.



39. Further, it is notable that the Claimant was asked via an email dated 3rd November 2020 by RW1 to explain his whereabouts on 2nd and 3rd November 2020. This would not have been the case had he been terminated from employment by the Respondent on 29th October 2020.
40. Granted, the Respondent may have initiated disciplinary proceedings against the Claimant. However, it is apparent that the said proceedings did not proceed to a logical conclusion as the parties explored an alternative mode of separation culminating in the execution of the Deed of Separation dated 11th February 2021.
41. In the end, the Claimant was not terminated from employment by the Respondent but was released from employment through the Deed of Separation.
42. Needless to say, the Claimant did not discharge his evidential burden as required under Section 47(5) of the *Employment Act* to prove that he was terminated from employment by the Respondent.
43. Having found that the Claimant was not terminated from employment, the second issue identified for consideration falls by the wayside.

Whether the Deed of Separation dated 11th February 2021 is binding on the Claimant

44. It is evident from the record that the Claimant and the Respondent executed a Deed of Separation dated 11th February 2021.
45. While admitting that he executed the said Deed of Separation, the Claimant has averred that he did so grudgingly as he was desperately in need of money to cater for his family and medical expenses.
46. It is notable that despite executing the Deed of Separation on 11th February 2021, the Claimant did not mount any challenge to the terms of the said Deed. Indeed, it was only through a letter dated 20th December 2022 that the Claimant issued the Respondent with a demand notice for the sum of KShs 4,446,323/= which he claimed to be terminal dues on account of unfair termination.
47. What's more, he did not raise any issue he may have had regarding the Deed of Separation dated 11th February 2021. His claim as per the demand letter dated 20th December 2022 was only limited to what he termed as the unfair termination of his employment.
48. In the event the Claimant had reservations regarding any of the terms of the Deed of Separation, it is reasonably expected that he would have rejected the same and raised any issues he may have had at the time of executing the Deed rather than wait for one year ten months to lapse and long after he had received the separation dues to claim further dues citing unfair termination.
49. After all, the Claimant had previously rejected the separation package proposed by the Respondent through the letter dated 29th October 2020 on the basis that it did not reflect the mutual negotiations they had had with the Respondent's Group Chief Operations Officer, Mr. Kangongo, hence his refusal to execute the same.
50. In the same measure, the Claimant would have rejected the Deed of Separation dated 11th February 2021 in the event he was not in agreement with the terms of the Deed of Separation.
51. Nonetheless, the Claimant executed the Deed of Separation and pocketed the separation dues then went silent for close to two years before electing to move the Court through the instant suit.
52. As per Clause 2B of the Deed of Separation, the parties had mutually agreed to sever the employment relationship subject to the terms and conditions set out therein.



53. Further by dint of Clause 5 of the said Deed, the Claimant was barred from taking or instituting any claims against the Respondent in relation to any claim arising from his employment.
54. In the circumstances, the Claimant accepted a separation package and waived his right to lodge any claim against the Respondent with respect to his employment.
55. Over and beyond, there is no evidence on record to prove that the Claimant signed the Deed of Separation involuntarily and without full knowledge of all the material information and the import of the document.
56. Indeed, being in the position of a Finance Manager, the Claimant was well aware and had full knowledge of the document he was appending his signature. In effect, he unconditionally released the Respondent from any claims he may have had relating to his employment and similarly, committed not to undertake or institute any such claims against the Respondent.
57. To this end, I am enjoined to consider and give effect to the said Deed of Separation executed by the parties.
58. On this issue I am guided and bound by the decision of the Court of Appeal in *Coastal Bottlers vs Kimathi Mithika* [2018] eKLR, where it was held that the settlement agreement was a binding contract between the parties and all the Court was required to do was to give effect to the intention of the parties as discerned from the settlement agreement.
59. In the absence of any vitiating element, the Claimant herein was estopped by clause 5 of the Deed of Separation from bringing a suit in connection with his employment seeking further reliefs.
60. On this score, I will follow the determination of the Court of Appeal in *Coastal Bottlers vs Kimathi Mithika* [supra], where it was held that:

“ Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.”
61. In light of the above holding, the Court finds that the Deed of Separation dated 11th February 2021 was binding on the parties and had the effect of discharging the Respondent from any action connected to the Claimant’s employment.
62. If I may say, it was quite disingenuous on the part of the Claimant to pocket the separation dues and then move the Court close to two years later, contrary to the terms of the Deed of Separation citing unfair termination.
63. Just as he accepted payment of the separation dues, he is bound by the other terms of the Deed not to institute a claim against the Respondent arising out of the employment. He cannot approbate and reprobate.
64. The upshot of the foregoing is that the Claimant’s suit is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

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STELLA RUTTO
JUDGE



In the presence of:

For the Claimant In person

For the Respondent Ms. Obiero instructed by Mr. Ogembo

Court Assistant Kemboi

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

