



**Ntaragwi v Egerton University (Cause 65 of 2017)  
[2024] KEELRC 1601 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1601 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 65 OF 2017  
DN NDERITU, J  
JUNE 26, 2024**

**BETWEEN**

**DR. GIDEON MWENDA NTARAGWI ..... CLAIMANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. This is a rather unfortunate matter that has had more than its fair share in the court system. The cause was initially filed in the High Court vide a plaint dated 19<sup>th</sup> December, 2006 filed on even date and referenced High Court at Nakuru Civil Suit No. 247 of 2006, through the firm of Wambua Musembi & Co. Advocates. As it is the procedure, the plaint was accompanied with a verifying affidavit sworn by the plaintiff (claimant) on even date.
2. The claimant is seeking the following reliefs -
  - a. A declaration that the ‘decision’ dismissing the claimant from employment was taken in breach of the rules of natural justice and to that extend unlawful, null and void and an order reversing the decision and reinstating the claimant to his duties.
  - b. General damages for unlawful dismissal.
  - c. Costs of this suit.
3. The defendant (respondent), a public university duly registered and chartered as such, entered appearance through the law-firm of Sheth Wathigo Advocates on 18<sup>th</sup> January, 2007 and filed a statement on defence on 25<sup>th</sup> January, 2007 denying the entire claim by the plaintiff and seeking that the suit be dismissed with costs.



4. The plaintiff filed a reply to the defence on 6<sup>th</sup> February, 2007 reiterating the contents of the plaint, seeking that the defence be dismissed and that judgment be entered in his favour as prayed in the plaint.
5. On 24<sup>th</sup> November, 2010, with the leave of the court, the defendant filed an amended defence and a counter-claim praying that –
  - a. The plaintiff's suit be struck out.
  - b. Judgment against the plaintiff for a sum Kshs.922,873.50/=
  - c. Refund of the salaries drawn by the plaintiff between September 1998 and September 2001.
  - d. Costs of this suit and of the counterclaim.
6. The plaintiff filed a reply to the amended defence and defence to counter-claim on 24<sup>th</sup> April, 2012 again seeking that the defence be struck out, the counter-claim be dismissed, and that judgment be entered in his favour as prayed in the plaint.
7. Somehow, the matter delay-dallied in the court system until 13<sup>th</sup> February, 2017 when the High Court (J. Mulwa J) directed for the transfer of the matter to this court (ELRC) whereby it was allocated the reference cited in the header.
8. With leave of the court granted on 16<sup>th</sup> June, 2022, the parties filed fresh witness statements, lists of documents and bundles of copies of the listed documents. The claimant filed his statement and a list of documents and a bundle of copies thereof on 5<sup>th</sup> June, 2022. The respondent filed a witness statement by Janet C. Bii and a list and a bundle of documents on 4<sup>th</sup> November, 2022.
9. The cause came up for hearing in open court on 6<sup>th</sup> March, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on the same day when Janet C. Bii (RW1) testified and the defence closed its case as well.
10. Counsel for both parties, Mr. Musembi for the claimant and Miss Oteyo for the respondent, addressed the court by way of written submissions. Mr. Musembi filed his submissions on 30<sup>th</sup> March, 2023 and Miss Oteyo filed on 16<sup>th</sup> May, 2023.

## **II. The Claimant's Case**

11. The claimant's case is expressed in the statement of claim, the reply to defence and defence to counter-claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by his counsel.
12. In the statement of claim, the claimant avers that the respondent employed him as a lecturer at the respondent's university in Njoro, Nakuru County. He avers that as per the contract between himself and the respondent he was on permanent and pensionable terms, as a lecturer in the languages and linguistics department, on the terms and conditions set out in the contract by and between the parties.
13. The claimant pleads that in 1997 with the full knowledge, permission, and approval of the respondent, he proceeded for further studies. In the year 2006, the claimant alleges that he learnt that the respondent had unilaterally and without any notice and/or communication dismissed him from employment without notice and in flagrant breach of the binding contract.
14. The claimant avers that at no time did he perform any act in breach of the terms of the contract of his employment and as such the respondent's act in dismissing him is termed baseless, illegal, malicious, and unlawful. He pleads that in his dismissal the respondent committed acts of blatant breach of the



- rules of natural justice as he was allegedly not accorded an opportunity to be heard and defend himself against the allegations or charges or any action taken against him.
15. In defence to the counter-claim, the claimant denies being indebted to the respondent in the sum of Kshs.922,893.50 or in any other sum of money or at all and puts the respondent to strict proof thereof.
  16. Further, it is pleaded that even if the claimant was indebted to the respondent as pleaded, which is however vehemently denied, the claim of Kshs.922,393.50, or indeed any other sum of money, is time-barred based on the Limitations of Actions Act and it is prayed that the counter-claim be struck out with costs for that reason.
  17. It was pleaded that despite demand made and notice of intention to sue issued the respondent has failed, refused, and/or neglected to reverse its allegedly illegal act rendering the filing of this suit necessary.
  18. In his testimony in court, the claimant reiterated the contents of his pleadings and his written statement filed in court on 5<sup>th</sup> June, 2022, as his evidence-in-chief. He also relied on and produced the documents in his filed list and bundle as exhibits 1 to 13. He stated that he did not desert duty as he was allegedly supervising two PhD students at the material time, namely Issa Mwamzadi and Earnest Sangai Muhochi. He further stated that he was not invited to the disciplinary hearing.
  19. In cross-examination, he confirmed that he signed a bond before proceeding on study leave of four to five years and the said bond agreement is the one that was availed in court by the respondent in its bundle of documents. He conceded that one of the terms of the mutually executed bond was that he was to serve the respondent for a period of at least five years upon completion of his studies in 1997. He stated that he applied for an extension as his studies took more time than he had anticipated and the extension was approved in July 1997. He was to resume his teaching duties with the respondent on 1<sup>st</sup> July, 1998.
  20. He stated that he had gone to the United States to pursue a PhD in Anthropology but before leaving he was teaching languages and linguistics at the respondent's university. He conceded that he did not have any records to confirm that he was supervising the said two alleged students, namely Issa Mwamzadi and Earnest Sangai Muhochi, as he alleged in his evidence in-chief.
  21. The claimant further stated that after July, 1998 he applied to be on unpaid leave via a letter dated 29<sup>th</sup> July, 1998. He stated that he had found a better paying job with St. Lawrence University, Kenya programme, wherein he was to serve as assistant director, academics programme and students services. He stated that he preferred his new job to his old position at the respondent's university.
  22. He stated that his pay at the respondent's university was stopped in 2001 but he allegedly continued working with the two students. He stated that in 1999, he had worked with the two PhD students on a one-on-one basis at the respondent's university. However, he admitted that he had no documentation to prove the allocation of those two students to him or a letter confirming his reporting to the head of the department after his returning back from the study leave. He also admitted that he did not have a letter confirming his reporting back date.
  23. He admitted that he did not complete the 5 years as an employee upon return from further studies as provided for in the bond but alleged that the respondent allowed him to go out on paid leave. He proffered that he did not know the extent to which respondent funded his studies overseas. However, he admitted that the respondent continued paying 80% of his salary from August, 1992 to 2001. He alleged that he continued working with the two PhD students until 2005, long after the respondent had stopped paying his salary. Again, he did not offer any formal evidence in support of this allegation.



24. The claimant conceded that the respondent refused to grant him the unpaid leave vide a letter dated 22<sup>nd</sup> April, 1999. However, he alleged that he came to realise he had been terminated when he stopped receiving his salary in 2001. He alleged that he supervised the two PhD students until 2005 without pay and he did not protest. He stated that by 2001 he was still working with St. Lawrence University.
25. In re-examination by his counsel, the claimant proffered that the records of his working with the two PhD students are in possession of the respondent and he denied absconding duty. He reiterated that he was not taken through a disciplinary hearing and as such the dismissal was wrongful, unfair, and unlawful.
26. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

### III. The Respondent's Case

27. The respondent's case is contained and understood from the amended response to the memorandum of claim, the counter-claim, the oral and documentary evidence adduced through RW1, and the written submissions by its counsel.
28. In the amended response to the claim, the respondent admits that the claimant was its employee but denies that the claimant sought and obtained leave of absence from duty after July, 1998 as alleged by the claimant. It is pleaded that the claimant unilaterally absented himself from and deserted duty leading to his inevitable dismissal. It is pleaded that the dismissal of the claimant was fair, just, and lawful both in substance and procedure.
29. On the counter-claim it is pleaded that the sum of Kshs.922,873.50 is the bond sum that the claimant undertook to pay to the respondent when he proceeded on the study leave in case he failed to resume his duties. It is pleaded that the claimant failed, refused, and or neglected to resume his duties upon expiry of the study leave and hence the said amount became due and payable.
30. Further, it is pleaded that the claimant unduly received salary for the period from September, 1998 to September, 2001 without offering any services to the respondent as he was supposed to resume his duties in or about September, 1998 after his study leave expired in August, 1998. The respondent therefore pleads for the refund of the unspecified amounts of money paid to the claimant as salary for the period that he did not offer services to the respondent as expected.
31. The respondent therefore pleads that –
  - a. The plaintiff's suit be struck out.
  - b. Judgment against the plaintiff for a sum Kshs.922,873.50/=.
  - c. Refund of the salaries drawn by the plaintiff between September 1998 and September 2001.
  - d. Costs of this suit and of the counterclaim.
32. In her testimony in court, RW1, the respondent's legal officer, relied on and adopted her filed written statement dated 31<sup>st</sup> October, 2022 which was filed on 4<sup>th</sup> November, 2022, as her evidence in-chief. She adopted and produced the list of documents dated 3<sup>rd</sup> November, 2022 and filed on even date, as the respondent's exhibits 1 to 21.
33. She stated that the claimant failed to adhere to the executed bond that was a binding agreement and failed to resume teaching after he was allowed to take study leave to pursue a PhD. She testified that the



claimant was supposed to resume duty on or about 1<sup>st</sup> July, 1998 and the respondent dismissed him eight years later in 2006 after he completely failed to report back.

34. RW1 stated that the procedure applied by the respondent is that masters and PhD students are allocated to a lecturer by the head of the department. The appointed lecturer is then notified, the students are informed of their lecturer, and the lecturer receives supervision fees. She stated that the lecturer must be available for such allocation of students to happen. When on study leave, especially out of the country, the lecturer is not available to teach or supervise students. In this instance, the claimant was on study leave abroad and he was not available for teaching or supervision of students. She avers that there is no way that the claimant could have been allocated students to supervise or teach as long as he was out of the country and on study leave.
35. She stated that the claimant was bonded to report back to the head of the department and present his certificate which he was expected to have acquired while abroad. She further testified that the claimant as a bonded lecturer ought to have adhered to the terms of the bond agreement and upon reporting back his salary was supposed to be readjusted from 80%, the payment rate of a lecturer on study leave, to 100%, and thereafter he was to be allocated classes. She stated that the claimant failed to report back.
36. RW1 stated that the respondent's counterclaim for Kshs.922,872.50 arises from the duly and mutually executed bond. She testified that the claimant should be ordered to pay the above-mentioned sum to the respondent as the same is due and payable. She stated that the claimant was not allocated two PhD students as he alleged and that is why there are no records showing that there were such students allocated to him. She stated that the respondent accommodated the claimant beyond the limits as he was paid 80% of his salary until 2001. She stated that the claimant did not present his PhD certificate upon completion of his studies as agreed between the parties when he took the study leave. She avers that the claimant dishonestly abandoned the respondent after helping him to earn his PhD thereby breaching the terms of the binding agreement and as such he should refund the claimed sum.
37. Further, RW1 stated that the claimant's letter of 29<sup>th</sup> July, 1998 indicated that his loyalty had shifted from the respondent to St. Lawrence University. She stated that on 7<sup>th</sup> February, 2006 the respondent wrote to the claimant about his desertion of duty whereupon the respondent proceeded with the disciplinary hearing on 23<sup>rd</sup> February, 2006, as the claimant deliberately failed and or refused to attend. Ultimately, it was resolved that the claimant be dismissed.
38. In cross-examination, RW1 stated that she was not working for the respondent when the claimant was employed but from the records the claimant was bonded in the sum of Kshs.922, 873.50 which amount he was to pay in case he did not adhere to the bond agreement. She stated that the bond was extended for a further 11 months. She conceded that the initial bond agreement reads Kshs.405,791.50 but the subsequent one upon the extension clearly and unambiguously committed the claimant in the said sum of Kshs.922,873.50 and the same was to mature on 1<sup>st</sup> July, 1998, if the claimant failed to report back to work and resume duty.
39. She stated that there are no records to confirm that the claimant taught and or supervised the two PhD students that the claimant alluded to in his oral testimony and that there are no records to confirm that indeed the alleged persons ever studied in the respondent university.
40. It is on the basis of the foregoing evidence and circumstances that the respondent is seeking that the claimant's claim be struck out, judgment be entered against the claimant in the sum of Kshs.992, 873.50/=, an order be made for the claimant to refund the entire monthly salary drawn by the claimant between September 1998 and September, 2001, together with costs of the cause and the counterclaim.



41. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### **IV. Submissions By Counsel**

42. Counsel for the claimant identified one broad issue for determination - Whether there was a valid and lawful reason for terminating the claimant and whether the said dismissal was procedural?
43. It is submitted that the respondent failed the legal requirement that the reason for dismissal or termination must be justifiable in law in accord with Section 43 of the *Employment Act* (the Act). Counsel cited several decisions including Nakuru ELRC Cause No. 362 of 2013 - Alex Semutwa vs Kenya Seed Company where the court held that the reason for the termination was not valid as provided for under section 43 of the Act. In Nakuru ELRC Cause No. 142 of 2015 - the court held that Section 43 of the Act places a burden on an employer to prove the reason(s) for termination or dismissal and Section 45 of the Act requires the employer to prove that the reason was fair and valid. In Nakuru ELRC Cause No. 11 of 2011 – Bernard Ngugi V G4S Security Services Kenya LTD it was held that termination of employment is a serious decision with invariably adverse consequences to the affected employee and as such preparation by way of a valid notice and fair hearing are crucial conditional precedents. It was further held that reasons raised must be attributed to the termination as envisaged under Section 43 of the Act.
44. Further, it is submitted that no notice or show-cause letter was issued to the claimant so as to enable him respond thereto and or defend himself against the charges or allegations against him.
45. The court is thus urged to award the claimant one month's salary in lieu of notice in the sum of Kshs.36,305/=, 12 months' salary in compensation amounting to Kshs.435,660/=, plus costs of the cause.
46. In regard to the counter-claim, it is submitted that as per the letter of dismissal dated 11<sup>th</sup> April, 2006, the effective date of dismissal is stated to be 1<sup>st</sup> September, 1998. Yet, the counter-claim was introduced in court through the amended defence and counter-claim filed in court on 24<sup>th</sup> November, 2010. It is submitted that the counter-claim was thus filed in court 12 years after the cause of action arose in September, 1998. It is submitted that even if the respondent was to rely on the contract of employment the limitation of such an action was six years from the date the cause of action arose based on Section 4 of the *Limitation of Actions Act*.
47. It is submitted that Section 90 of the Act limits actions in employment and labour matters to a period of three years immediately after the cause of action arises. It is therefore submitted that whichever way one looks at the issue the counter-claim is awfully time-barred.
48. Further, and without prejudice to the foregoing, it is submitted that the bond was binding the claimant in the sum of Kshs.405,796.50 in case of his failing to report back for duty with the respondent, yet the respondent, allegedly without any basis or foundation whatsoever, is claiming from the claimant a sum of Kshs.922,873.50.
49. On the basis of the foregoing counsel for the claimant urged the court to enter judgment for the claimant as prayed with costs and that the counter-claim be dismissed with costs.
50. Counsel for the respondent identified the following issues for determination by the court - Whether the claimant's termination was unlawful; Whether the claimant is entitled to reliefs sought; whether the respondent is entitled to the claim of Kshs.922,873.50 in the counter-claim; Whether the respondent is entitled to refund of the salaries paid to the claimant between September, 1998 and September, 2001



as pleaded in its defence and counterclaim; and, Whether the respondent is entitled to the costs of the suit and counterclaim plus interest.

51. On whether the claimant was unlawfully terminated, it is submitted that the claimant breached the study leave contract and the bond thereof despite the respondent being too lenient with him and giving him all the leverage for manoeuvre and accommodation that he requested for to enable him complete his studies. For example, the claimant requested for an extension to his study leave, which was granted with a new bond agreement signed on 4<sup>th</sup> September, 1997. However, instead of resuming his duties with the respondent in July 1998, as agreed in the terms of the bond, the claimant secured a job with St. Lawrence University Kenya Semester Program where he admittedly earned a better salary than what he earned with the respondent, while all along earning a salary from the respondent without offering any services.
52. Further, it is submitted that the claimant invited his dismissal after absconding duty and failing to respond to the show-cause letter and neglecting to attend the disciplinary hearing. Counsel cited the case of Richard Boiyo vs Meru University of Science and Technology (2022) eKLR wherein the court dismissed the claimant's case on account of failure to prove unfair termination and cited Section 47 (5) of the Act. Counsel also cited Patrick Wambasi vs Moi University (2018) eKLR wherein the court dismissed the cause on the basis that the claimant had failed to comply with the terms of the study leave bond that required him to return and serve the respondent university after completing his studies.
53. It is submitted that the respondent's action of dismissing the claimant was in tandem with the provisions of Section 44 (4) (a) of the Act hence lawful. It is submitted that the respondent should therefore not be faulted for dismissing an employee, the claimant, who absconded and later deserted duty without a valid reason, excuse, or leave. Counsel also cited Kenya Power & Lighting Company Limited vs Aggrey Lukorito [2017] eKLR in support of the submission that the respondent had lawful and justifiable reason for dismissal of the claimant and the court is urged to find and hold as such.
54. It is further submitted that the claimant was informed of the charges and or allegations against him in the letter dated 7<sup>th</sup> February, 2006 which also invited him for a disciplinary hearing. However, the claimant neither responded to the charges/allegations nor did he attend the hearing.
55. Based on the foregoing, it is submitted that the claimant was afforded and accorded both substantive and procedural fairness and the court is urged to find and hold so.
56. On the reliefs sought, counsel submitted that the claimant did not produce any records to confirm that he was during the material time supervising two PhD students allegedly allocated to him. It is submitted that RW1 was categorical that the claimant never reported back to the head of his department and he was not assigned any PhD student(s) and that is why he did not provide any documentation in court to prove that he supervised such student(s). RW1 was categorical that there are no such records in the custody of the respondent and that is why none were availed in court. However, dishonestly and fraudulently, the claimant continued to enjoy his salary until 2001 when the said salary was discontinued by which time the claimant had secured another job at St. Lawrence University Kenya Semester Program since 1998 where he simultaneously earned a salary. In other words, the claimant was earning two salaries while all along not offering any services to the respondent at all.
57. On the counter-claim of Kshs.922,873.50 by the respondent, it is submitted that as per the duly mutually executed bond the claimant was financed to the tune of Kshs.922,873.50. However, it is submitted that the claimant failed to meet his part of the bargain for failing to resume his duties for a minimum of five (5) years upon completion of his PhD studies. The evidence on record is that instead of resuming his duties, the claimant secured a job with St. Lawrence University Kenya Semester



- Program in total and flagrant breach of the terms of the bond. Counsel for the respondent urges that in those circumstances the court should order the claimant to refund that money to the respondent.
58. Counsel cited *University of Nairobi vs Leonard Lisanza Muaka* [2020] eKLR wherein the court found that the respondent owed the claimant the bonded sum after the respondent failed to comply and abide with the terms thereof.
59. On whether the respondent is entitled to refund of the monies paid in salary to the claimant between September, 1998 and September 2001, it is submitted that the respondent is entitled to refund of the monies as the claimant was not serving at the respondent and yet he was dishonestly and fraudulently earning a monthly salary from the respondent. Counsel submits that the salary ought to have been paid in arrears for services rendered and an absentee employee is not entitled to a salary and as such it is urged that the claimant be ordered to refund the money paid to and received by him as salary for the said period.
60. On costs of the suit and of the counterclaim, it is submitted that the claimant's claim should be dismissed with costs and the counterclaim allowed with costs and interest.

#### **V. Issues For Determination**

61. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to this court for determination –
- a. Was the dismissal of the claimant wrongful, unfair, and unlawful?
  - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
  - c. Is the counter-claim by the respondent time-barred by limitation?
  - d. If (c) above is in the negative, is the respondent entitled to the reliefs sought in the counter-claim?
  - e. What are the appropriate orders on costs in regard to the cause and the counter-claim?

#### **VI. The Dismissal**

62. The facts and the circumstances leading up to the dismissal of the claimant by the respondent are not really in dispute. The claimant was at all material times an employee of the respondent as a lecturer in the department of languages and linguistics. In 1992 the claimant secured an opportunity to further his studies in pursuit of a PhD and the respondent obliged in supporting the claimant in his venture on the terms and conditions set out and mutually agreed as contained in a duly and mutually executed bond. The claimant was to continue earning his monthly salary at the rate of 80% while on the study leave of three years. Upon completion of his studies, it was mutually agreed that the claimant was to serve the respondent for a minimum period of five years.
63. However, the claimant sought for an extension of the study leave for a total of five years and the respondent reluctantly conceded to the request whereupon another bond was duly and mutually executed which obligated the claimant to pay to the respondent a sum of Kshs.922,873.50 in case he failed to resume his duties with the respondent and serve thereat for a period of five years.
64. It was mutually agreed that the claimant was to resume his duties with the respondent by July, 1998. However, the claimant did not resume his duties as agreed and undertaken but instead secured a job with St Lawrence University (USA) which was running a programme in Kenya. In his testimony in



court, the claimant admitted that he took this job because it was paying better than what he was earning with the respondent.

65. However, in what the court considers to be fraudulent and dishonest misconduct on the part of the claimant, he did not inform the respondent of his intention not to resume his duties as agreed, he did not ask for his monthly salary to be stopped, and he neither undertook to nor refunded the sum of Kshs.922,873.50 as agreed in the bond. Probably due to what the court considers to be weak or lack of proper administrative and management systems and processes, the claimant continued earning his monthly salary with the respondent, at 80%, until September, 2001.
66. Vide a letter dated 22<sup>nd</sup> April, 1999 the respondent categorically informed the claimant that his study leave had expired in July, 1998 and that he was supposed to have resumed duty with the respondent. The claimant did not heed to this directive.
67. On 7<sup>th</sup> February, 2006 the respondent addressed the claimant as follows –

EUNJ/20014/54 7/2/2006

Dr. Gideon M. Ntarangwi

Box 43795

NAIROBI

Dear Dr. Ntarangwi

Re: Abscondment Of Duty

A perusal of our records indicate that you have been away without permission since April 1999, immediately after completing your PhD studies.

You have been invited to appear before a Counsel Disciplinary Committee on Thursday 23<sup>rd</sup> February, 2006 to answer charges of abscondment of Duty and breach of bond which you signed prior to commencement of your training. The Disciplinary session will be held at the Agricultural Resource Centre (A.R.C.) Conference Room at 9.00 a.m.

Yours sincerely

J.K. Kairu

For: Registrar(administration)

cc: VC ]

DVC(A&F) ]

DVC (AA) ] to see file

R/Admin ]

R/AA ]

DVC (R&E)

Dean – Faculty of Arts & Social Sciences

Chairman – Languages, Linguistics & Literature Dept.

JKK/JMM/rw



68. It is the respondent's case that the above letter served as a show-cause letter and also informed the claimant of the hearing of the disciplinary charges against him. The claimant neither responded to the above letter nor did he attend to the hearing as invited.

69. A copy of the minutes of the disciplinary hearing were filed by the respondent. Ultimately, the claimant was dismissed vide a letter dated 11<sup>th</sup> April, 2006 which stated that –

EUNJ/20014/55 11/4/2006

Dr. Gedeon M. Ntarangwi

Box 43795

NAIROBI

Dear Dr. Ntarangwi,

Re: Dismissal

Following the Council Disciplinary Committee Meeting held on Thursday, 23<sup>rd</sup> February, 2006 at the Agricultural Resources Center Boardroom in which you did not attend, I wish to inform you that the Committee after deliberating on your case found you guilty of the accusations levelled against you.

Consequently, the Council Committee resolved that you be dismissed from the University services with effect from 1<sup>st</sup> September, 1998. Since you were bonded to work for five (5) years after your studies, make arrangements to pay the bond amounting to Ksh.922,872.50 together with salary overpayment since September, 1998 to September, 2001 to avoid legal action being taken against you and our guarantor.

Please arrange to immediately hand over all University property that may be under your care and have the enclosed liability clearance certificate completed for further action.

Yours sincerely

J.K. Kairu

For: Registrar(administration)

c.c. VC ]

Ag. DVC (A&F) ]

DVC (AA) ] To see in file R/Admin. ]

R/AA ]

DVC (R&E)

Dean Faculty of Arts & Social Sciences

Chairman, Literature, Languages, & Linguistics Department

Finance Officer

Chief Medical Officer

Bond Guarantor, Dr. Samuel Mwonga – Biological

Sciences Department.

JKK/cko



Encl.

70. It is as a result of the dismissal that the claimant filed this cause, initially in the High Court, on 19<sup>th</sup> December, 2006.
71. A multitude of decisions, some of them cited by counsel for the parties herein, have been generated by this court (ELRC) on what amounts or does not amount to wrongful, unfair, and or unlawful dismissal or termination. Besides what is cited by counsel and restated in an earlier part of this judgment also see – Mary Chemweno vs Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno vs Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro vs Teachers Service Commission (2012) eKLR.
72. The question then becomes - Viewed from the entire evidence and circumstances of this cause, was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful? In the considered view of this court the respondent had good, genuine, and reasonable grounds for dismissing the claimant. The evidence on record, as restated above, is that the claimant absconded and thereafter deserted duty without any communication or justified cause. After benefiting from the generous support from the respondent, a public institution running on taxpayers' funds, to pursue a PhD the claimant secured a job with a foreign university that was running a programme in Kenya. The claimant did not deem it fit to inform the respondent of his decision not to resume his duties, he kept it a secret that he had secured another job, and he did not ask for payment of his salary to be stopped and hence he continued to dishonestly and fraudulently receive the monthly pay for a period of over six years without offering services to the respondent.
73. The court agrees with the respondent that in the foregoing circumstances the respondent had good, genuine, and lawful grounds for the dismissal of the claimant in accord with Sections 43 & 44(4)(a) of the Act. Thus, in terms of substance, the court returns that the dismissal was neither wrongful, nor unfair, or unlawful.
74. The allegation and claim by the claimant that he was supervising two PhD students allegedly upon resuming duty with the respondent is in my view an afterthought and a lie intended to mislead the court. If that claim was true the claimant should have availed evidence of allocation of the students to him, his notes or records of his working with the alleged students, or altogether he should have called the said students as his witnesses in court. RW1 was very clear in her evidence that there are no records of such students allegedly supervised by the claimant.
75. In terms of the procedure adopted by the respondent, the court notes that the claimant was served with a letter dated 7<sup>th</sup> February, 2006 informing him of the charges/allegations against him and inviting him for a disciplinary hearing on 23<sup>rd</sup> February, 2006. The claimant did not respond to this letter and he did not attend the hearing.
76. Each case has to be viewed and decided on its own peculiar facts, evidence, and circumstances. The claimant is an educated and informed individual who cannot be equated to a security guard or a house-manager aka house-help. The conduct of the claimant at all the material times is suspect. He fraudulently and dishonestly earned a salary for over five years without working and failed to resume his duties with the respondent after he was offered generous support to earn a PhD at the taxpayers' cost.
77. He was informed of the charges against him as per the letter cited above and given an opportunity to respond thereto. He did not act, ostensibly due to his misconduct alluded to above, and only acted upon dismissal. If he actually received the letter of dismissal and he admitted so, mutatis mutandis, the



court holds that he was served and received the letter dated 7<sup>th</sup> February, 2006 informing him of the charges and inviting him for the disciplinary hearing.

78. In the entire circumstances of this cause the court shall not fault the respondent for the procedural steps taken in dismissing the claimant.
79. For all the foregoing reasons, the court finds and holds that the respondent by and large complied with the substantive and procedural fairness envisaged in law in dismissing the claimant and consequently the claimant is not entitled to any compensation. It is so found, held, and declared.

## VII. The Counter-claim

80. Without the necessity of reproducing the evidence, which has been repeatedly analysed and restated in the foregoing paragraphs of this judgment, the claimant was supposed to resume his duties with the respondent in July, 1998, upon completion of his studies and earning a PhD. He did not resume his duties with the respondent as mutually agreed and the respondent reminded him of that obligation vide a letter dated 22<sup>nd</sup> April, 1999. Likewise, the claimant did not honour the bond that required him to pay a sum of Kshs.922,813.50 in default of reporting back to duty.
81. In the circumstances, the sum of Kshs.922,813.50 became due and payable by the claimant to the respondent upon the claimant's failure to report back on duty in July, 1998. However, based on Section 4 of the *Limitation of Actions Act* the respondent ought to have proceeded in court to recover the said sum of money within six years from July, 1998. However, the respondent did not take out recovery proceedings until 24<sup>th</sup> November, 2010 when it filed an amended defence and counter-claim in this cause. In 1998 the *Employment Act* 2007 had not been enacted and as such Section 90 thereof was not applicable. Either way, the counter-claim by the respondent against the claimant is way out of time and hence statutorily time-barred. The said claim is untenable and it is hereby dismissed.
82. Similarly, the claim by the respondent for refund of the salary unlawfully and irregularly paid to the claimant is dismissed as the same is neither quantified nor evidenced through any records which records should ordinarily be in the custody of the respondent.

## VIII. Orders

83. For all the reasons above, the court makes the following orders –
  - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was fair, just, and lawful.
  - b. The entire claim by the claimant be and is hereby dismissed with no order as to costs.
  - c. The entire counter-claim by the respondent be and is hereby dismissed with no order as to costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

