



**Theuri v Integrated Payment Services Limited (Cause 2220 of 2017)
[2024] KEELRC 1506 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1506 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2220 OF 2017**

J RIKA, J

JUNE 14, 2024

BETWEEN

JENNIFER WANGUI THEURI CLAIMANT

AND

INTEGRATED PAYMENT SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed an Amended Statement of Claim, on 30th November 2017. The initial Claim was filed on 8th November 2017.
2. She states that she was employed by the Respondent, a wholly-owned subsidiary of the Kenya Bankers Association, effective 11th November 2016.
3. She was employed as the Respondent's Chief Executive Officer, at an annual salary of Kshs. 14,400,000 [Kshs. 1,200,000 monthly].
4. The contract was for a limited term of 3 years. It was renewable.
5. It provided for a probation of 6 months.
6. She states that she successfully completed probation on 10th May 2017.
7. There was no request at the end of probation for its extension, and no indication that the Claimant's performance was wanting, to justify extension.
8. She met the Respondent's Director Habil Olaka on 10th July 2017, who informed her that the Respondent's Board of Directors, had resolved to extend the Claimant's probation by 3 months.
9. She was handed a letter indicating extension was up to 10th October 2017, and highlighting the areas where the Claimant was required by the Board, to improve her performance. She was told that there would be performance review sessions between her and Olaka, every two weeks.



10. She sought explanation why probation was being extended 2 months, after she had successfully completed the 6 months imposed at the outset.
11. She was told that she did not complete probation satisfactorily, as the Respondent had only gone on live on its PesaLink System, in February 2017.
12. She had attended Kenya Bankers Association Management meetings every week, and its Governing Council meetings quarterly during her probation. No issue concerning her performance was brought forward, during these meetings.
13. The Claimant nevertheless acceded to extension, to avoid a collision with Olaka.
14. She served the extended period diligently, in full compliance with her contract of employment and the Respondent's staff handbook. She met Olaka fortnightly for review of performance, as advised. There was no indication that the Claimant was not meeting her mandate.
15. Olaka advised the Claimant through an e-mail dated 22nd September 2017, that she submits an evaluation report, which would be used by the Board in assessing if she had served extended probation satisfactorily.
16. She did so, detailing her performance record. As of 10th October 2017 when extended period expired, there was no indication that the Respondent was still not satisfied, with the Claimant's performance.
17. Following a Board meeting held on 23rd October 2017, the Claimant was advised to meet 3 members of the Board- Olaka, Lamine Manjang and John Gachora.
18. They informed her that the Board had resolved to terminate her contract, because Olaka was not satisfied with her performance evaluation report. She protested this position, underscoring that she had held meetings with the Kenya Bankers Association Management and its Governing Council regularly, where no issues concerning her performance were communicated.
19. On 24th October 2017, she met Olaka and the Human Resource Manager, where Olaka was unable to give details of the Claimant's poor performance, instead, stating that his feeling was that the Claimant was not up to scratch.
20. She continued to engage with Olaka, who demanded that she issues a letter of resignation to facilitate payment of notice and gratuity to her. Failing which the Respondent would issue her a letter of termination. Olaka informed the Claimant that her probation would end on 10th November 2017, implying that there was further and unilateral extension of probation by 1 month.
21. The Claimant approached the Court on 8th November 2017, and sought an order of injunction against the Respondent, restraining the Respondent from harassing or victimizing her, or terminating her contract. The order was granted and served on the Respondent, who disregarded it, terminating the Claimant's contract on the same date, 8th November 2017.
22. She prays for: -
 - a. Declaration that:
 - (i) attempted extension of the Claimant's probation beyond 10th October 2017 was illegal, unlawful, unfair and malicious.
 - (ii) demand for resignation made to the Claimant was illegal, unlawful, unfair and malicious.



- (iii) the Respondent subjected the Claimant to unfair labour practices, in contravention of the Constitution and statutory employment right.
 - (iv) that termination was illegal, unlawful and unfair.
 - b. Payment of the Claimant's terminal dues comprising the following:
 - (i) salary for days worked in November 2017, up to and including 8th November 2017 at Kshs. 327,272.
 - (ii) accrued annual leave [29 days] at Kshs. 1,581,818.
 - (iii) 1-month salary in lieu of notice at Kshs. 1,200,000.
 - c. Compensation for unfair and unlawful termination equivalent of 12 months' salary.
 - d. Damages for subjecting the Claimant to unfair labour practices.
 - e. Costs.
 - f. Interest.
- 23. The Respondent filed its Statement of Response, on 1st November 2018. It is conceded that the Claimant was employed by the Respondent as its CEO, for a limited term of 3 years, and that employment was subject to probation.
- 24. She was consistently in communication with Habil Olaka during probation, and was advised that confirmation depended on satisfactory performance.
- 25. By the time the letter dated 10th July 2017 issued to her, the Claimant was well aware that she had not been confirmed. She was also aware that probation had been extended to 10th November 2017, which was for a period of another 6 months, from 10th May 2017, when the first 6 months expired. She signed the extension letter, acknowledging her performance failures.
- 26. She met Habil Olaka bi-weekly between July –October 2017 for review. In all the meetings, it was made clear that the Claimant was not meeting her obligations under the Performance Improvement Plan.
- 27. At no time was the Claimant told that her probation was to end on 10th October 2017. She was advised to submit her self-evaluation report leading to the end of her extended probation. The report was discussed by the Respondent's Board. On 23rd October 2017, the Board, through its Chair, Vice-Chair and Olaka, informed the Claimant that it had been resolved that the Claimant is not confirmed as the CEO.
- 28. Her contract was terminated on 8th November 2017. She had not reported to work on this date, and an advance copy was sent to her via e-mail.
- 29. The Respondent was not aware that the Claimant had filed this Claim and obtained an order of injunction, until 9th November 2017, when it received the pleadings and a copy of the order. By this time termination had already taken place.
- 30. She was paid salary for the period 1st to 8th November 2017, accrued annual leave of 29 days and 1-month salary in lieu of notice. There is no justification in the claim for the same items.
- 31. She is not entitled to compensation. Her contract was fairly and lawfully terminated. The Respondent did not violate her Article 41 rights. The Respondent urges the Court to dismiss the Claim with costs.



32. The Claimant gave evidence and rested her Claim, on 14th July 2023. Kenya Bankers Association CEO and Director Habil Olaka, gave evidence on 17th November 2023, closing the hearing. The Claim was last mentioned in Court on 1st March 2024, when the Parties confirmed filing and exchange of their closing submissions.
33. The Claimant relied on her witness statement and documents on record, in her evidence-in-chief. She reiterated that she thought she had been confirmed because the last date for the second period of probation, passed without further extension. She felt confused and intimidated. She had performed well. The Respondent had been internationally recognized during her tenure. She was not given a hearing. Instead, the Respondent persistently called on her to resign.
34. Cross-examined, she told the Court that she answered to Habil Olaka. Probation was for 6 months. Confirmation depended on performance. Olaka met her weekly but did not give her his views on performance. He told her, extension would be for 3 months. The letter dated 10th July 2017 states it was up to 10th November 2017. She signed the letter. Initial probation ended in May 2017. Olaka placed her on PIP. This would last 3 to 6 months. She did not agree that extension was justified. She did not write to the Respondent, stating that she considered her contract to have been confirmed at any time.
35. She submitted a self-assessment report, as advised by Olaka. It was to be reviewed by the Board. The Board just told her that it would not renew her contract. She was given a chance to resign. She did not request for extension to the end of December 2017. She did not agree that she was discontinued because of poor performance.
36. Redirected, she told the Court that no reason was given to her for termination. She only met Board members, after a decision had been made. She was not given a letter saying she was not performing. The meeting was just a formality.
37. Habil Olaka relied on his witness statement dated 31st October 2018, and documents filed by the Respondent, in his evidence-in-chief. The Claimant was initially on probation of 6 months. It was extended for another 6 months. She did not meet expectation. Extended probation was to lapse on 10th November 2017. She was released on 8th November 2017. She was paid terminal benefits, including salary for the period 1st to 8th November 2017, telephone allowance of 6 days, pending annual leave of 29 days, and notice of 1-month, amounting to Kshs. 2,183,373 after tax. Her contract was fairly and lawfully terminated.
38. Cross-examined, Olaka told the Court that he had given a tabulation of meetings held with the Claimant, during her probation. He did not recall if over 30 banks were involved at the launch of integrated switch, in 2016-2017. This was an event involving activation of PesaLink. The Claimant was involved, as the CEO. Redirected, Olaka told the Court that he was the Claimant's supervisor. The Claimant accepted extension of probation, appending her signature to the letter of extension.
39. The issues are whether the Claimant's probationary period was extended lawfully; whether the Respondent terminated her contract fairly; and whether she merits the prayers sought.

The Court Finds: -

40. The Claimant was employed by the Respondent in the position of CEO. Her letter of employment is dated 12th October 2016.
41. She was employed for a period of 3 years, effective 11th November 2016.



42. She did not serve the full period. The Respondent terminated her contract through a letter dated 8th November 2017.
43. The reason is stated. The Claimant was advised that after the period of extended probation, it was the resolution of the Respondent's Board, that her contract should not be confirmed.
44. Clause 11 of the Claimant's contract provided for an initial probation of 6 months.
45. Parties agree that this commenced on 11th November 2016, and ended on 10th May 2017.
46. The Respondent exhibits a letter dated 10th July 2017, indicating that the Claimant's probation had been extended to 10th November 2017. This was for a period of 6 months.
47. The Claimant exhibits the same letter, similarly worded, and on the Respondent's letterhead, and bearing the signature of Habil Olaka.
48. Her letter however, indicates that probation was extended to 10th October 2017. She argues she was placed on extended probation of 3 months, which ended on this date, and any other extension was unilateral and illegal.
49. The letter exhibited by the Claimant does not bear her signature. It is not certified as a true copy of the original.
50. She exhibits the same letter twice- in her documents filed with the Amended Statement of Claim at page 8, and as an annexure to her Affidavit supporting her Application dated 8th November 2017. Both copies indicate that probation had been extended to 10th October 2017, and are indicated to be signed by Habil Olaka, but not by the Claimant.
51. It is unfortunate that a former CEO and a Director of a leading banking services institution, would exhibit before the Court, the same document, but with a different date, on the end of the extended probationary period.
52. The Court upholds the copy exhibited by the Respondent, which is certified as a true copy of the original, and which is signed by both Olaka and the Claimant, as the letter which extended the Claimant's probation by 6 months, to 10th November 2017. The Claimant confirmed on cross-examination that she signed the letter extending probation, to 10th November 2017.
53. Although the Respondent referred to its Staff Handbook as the basis for extending probation by 6 months, the Court has not seen a specific clause in the Staff Handbook, which mentions extension of probation by 6 months.
54. Schedule 6 of the Staff Handbook which the Respondent quotes, in the extension letter, does not seem to the Court to be intended to be applied to probationary contracts. The performance development procedure is not practicable to probationary Employees. Although the Respondent invokes schedule 6, there is hardly any evidence that the procedure was applied with regard to the Claimant. It is not practicable to invoke this procedure to probationary Employees.
55. The strenuous procedure involves identification of performance issues; consideration whether poor performance is caused by the Employee's disability; and the convening of a capability hearing which involves the same procedural rights, as a disciplinary hearing, under Section 41 of the [Employment Act](#).
56. After capability hearing comes in, what is described as stage 1 hearing [Performance Development Plan]. If there is no improvement at stage 1, in comes stage 2 capability hearing. If there is no improvement at the end of stage 2, the Employee is given a final written warning.



57. A final written warning will remain for 12 months, which does not appear to accommodate the limited period, which regulates the lifespan of probationary contracts.
58. Schedule 6 provides for stage 3 hearing, if there is no improvement after the final warning. Hearing takes the shape of any other disciplinary hearing under Section 41 of the [Employment Act](#), and would lead to dismissal or redeployment under schedule 6.
59. There is a right of appeal after dismissal or redeployment decision, which again retains the procedural rights under Section 41 of the [Employment Act](#).
60. The Appeal may culminate in a rehearing.
61. It cannot in the view of the Court, be intended that Employees on probation are dealt with under schedule 6 of the Staff Handbook. It is not practicable. The timeliness alone, under schedule 6, would exceed the maximum allowable time for an Employee to be under regular and extended probation. Will these procedures be accommodated within an aggregate period of 12 months? Schedule 6 of the Staff Handbook can only be of utility, in dealing with regular Employees as opposed to probationary Employees.
62. The Claimant's contract, does not mention extension of probation. Clause 11 is confined to 6 months, and termination during the period, through notice of 1-month or payment of 1-month salary by either Party.
63. To determine if extension was fair and lawful, the Court has to resort to the [Employment Act](#) on probation, which is itself not free from legal controversy.
64. Under Section 42 [2] of the Act, it is clear that a "probationary period shall not be more than 6 months, but it may be extended for a further period of not more than 6 months, with the agreement of the Employee."
65. Section 42 [3] prohibits probationary periods that exceed an aggregate of 12 months.
66. The letter exhibited by the Respondent, dated 10th July 2017, signed by Olaka and the Claimant, constituted an agreement for extension of probation, by a further period of 6 months, ending 10th November 2017.
67. Extension was in accordance with Section 42 [2] of the [Employment Act](#).
68. This provision of the law does not state that the Employer shall give reasons, and justify extension. It is left solely to the proposal of the Employer, and the agreement of the Employee. Protection against unfair extension is granted to the Employee, by the requirement that the Employee concedes to extension. The law only requires that there is concurrence of the Parties. In examining if fair and lawful procedure was followed, the Court need only look at the requirements of Section 42 and the clause on probation. The Court does not therefore think that there was need for the Respondent to go into details justifying extension, the Claimant having agreed to have probation extended.
69. The second issue is whether in terminating the Claimant's contract, at the end of extended probation, or by declining confirmation, the Respondent had an obligation to satisfy the procedural and substantive standards of fair termination of employment, contemplated under Sections 41, 43 and 45 of the [Employment Act](#).
70. In the view of the Court, during probation, both Parties must be free to terminate employment for any, or no reason, subject only, to the terms of the probationary contract and the demands of Section



- 42 of the [Employment Act](#). It is sufficient reason that the Employer forms the view, that probation performance is not satisfactory, and confirmation therefore not warranted.
71. This was the holding in this Court’s decision in *Danish Jalang’o & 2 Others v. Amicabre Travel Services Limited* [2014] e-KLR, and by way of comparative jurisprudence in the more recent Irish Court of Appeal decision, in *O’Donovan v. Over C Technology Limited & Another* [2021] e-KLR. The Court cannot imply the rights granted under Sections 41, 43 and 45, in termination of probationary contracts under Section 42. To impose such standards of fairness, would defeat the whole purpose of the probationary period.
 72. The Irish Court of Appeal was emphatic that, “both parties are, and must be free to terminate the contract of employment, for no reason, or simply because one party forms the view that the intended employment is, for whatever reason, not something with which they wish to continue.”
 73. It was not indeed necessary for the Respondent to give tonnes of evidence, concerning the Claimant’s poor performance, or establish that the Claimant was placed on PIP. It was sufficient that she accepted extension by signing the letter dated 10th July 2017, and it was expected that she would not be confirmed at the end of the extended period, if the Respondent through its assessment of the Claimant’s performance, formally or informally, formed the view that she was not suitable to discharge the role of CEO.
 74. She held bi-weekly meetings with her supervisor Habil Olaka, which were detailed in the evidence of Olaka. There was constant communication from the Respondent that, as agreed from the inception of probation, confirmation depended on the Respondent being satisfied about the Claimant’s performance. The Claimant prepared and submitted her self-evaluation report, and everything was deliberated upon by the Board, before a resolution was made, not to confirm her contract.
 75. The Judgment of this Court in *Monica Munira Kibuchi & 6 Others v. Mount Kenya University & the Attorney-General* [2021] e-KLR, which concluded that section 42 [1] of the [Employment Act](#) is inconsistent with [the Constitution](#), because it excludes the application of the right of hearing under Section 41, is not a good precedent, and does not bind this Court. Sections 41 and 42 are different, standalone procedures, which regulate different forms of employment contracts. One deals with a consummated employer-employee relationship; the other, a relationship which is inchoate. The Court is only required to enquire into the terms of the probationary contract, and whether the requirements of Section 42 have been satisfied, rather than go into analyses of Sections 41, 43 and 45 of the [Employment Act](#), or even Article 47 of [the Constitution](#), in determining if probationary contract has been brought to an end fairly and lawfully.
 76. The Supreme Court of Zimbabwe, in *St. Giles Medical Rehabilitation Centre v. Lambert Patsanza*, Judgment No. SC 59/18, Case No. SC 668/15, emphasized that probation is now generally accepted as a time, when the Employer can evaluate a ‘potential Employee,’ before opting to accept him or her as a full time Employee. The Court correctly applied the term ‘potential Employee’ to probationary Employees. It held that probationary period is a trial period, and that the probationary period forms a separate and distinct contract. The Employee must complete probation successfully to be offered a second and regular contract of employment. To avoid confusing the probationary contract with the regular contract, it is prudent that Employers draw separate contracts, the first clearly indicated to be probationary, rather than draw a single contract detailing terms and conditions of service, even before a ‘potential Employee,’ has been confirmed in employment.
 77. The Zimbabwean Court held, as provided for in our Section 42 of the [Employment Act](#), that there are 2 ways in which an unsuccessful probationary Employee can exit employment: the first is to allow the probationary period to expire naturally, wherein the Employee is released at the end of the specified



- period; the second is to release the probationary Employee before the end of the period. Under the second option, notice must be given in accordance with the terms of the probationary contract.
78. There does not seem to be additional procedural requirements on termination of probationary contracts, such as imported to Section 42 of the *Employment Act*, by the decision of the Court in *Monica Munira Kibuchi & 6 Others v. Mt. Kenya University* cited above.
 79. Employers are not obligated to hear Employees on termination of probationary contracts, on the strength of Section 41 of the *Employment Act* or Section 4 [3] of the *Fair Administrative Action Act*. Section 4[6] of the latter Act, states that, “ where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”
 80. Section 42 [1] of the *Employment Act*, which ousts the application of Section 41 of the Act, on hearing prior to termination, is a written law contemplated by Section 4[6] of the *Fair Administrative Action Act*. It creates a different procedure. It excludes the right of hearing, but retains the basic principles of fair administrative action under Article 47- it is expeditious, efficient, lawful, reasonable and procedurally fair. In other words, actualization of Article 47 rights in termination of probationary employment, does not invariably, incorporate the right of a hearing.
 81. Procedural fairness or rules of natural justice, and the broad standards of fairness under *the Constitution*, should not be interpreted by the Courts in a manner that distorts the intention of the Parties to a contract of employment, and the objectives of the *Employment Act*.
 82. Employment law attaches great weight, to length of employment periods. It recognizes the need for the Parties to have time to become regular with each other, to build a relationship which can be sustained over time, to invest in each other, create stability and enhance productivity.
 83. Employment law in Kenya and elsewhere therefore creates qualifying periods, for certain employment rights and obligations to accrue. Thus, an Employer is allowed to take in an Employee on probationary terms, and is free to confirm or terminate the relationship, after a maximum of 12 months. Section 28 of the *Employment Act* grants an Employee annual leave entitlement of not less than 21 days, after every 12 consecutive months of employment. Section 30 qualifies the sick leave entitlement of not less than 7 days with full to pay, to an Employee, after 2 consecutive months of service. Section 35 [5] extends service pay to Employees whose contracts are terminated under subsection 1[c], and not those terminated under various other notices. Section 37 allows for conversion of casual contracts into regular contracts, where the Employee works for continuous working days, which amount in aggregate, amount to the equivalent of not less than 1 month.
 84. Section 45 [3] of the *Employment Act* prescribes a qualifying period of employment, of not less than 13 months, for an Employee to have the right to complain that he has been unfairly terminated. This provision was found to be inconsistent with the right not to be discriminated against, under *the Constitution*, in another constitutional litigation, *Samuel G. Momanyi v. Attorney-General & Another* [2012] e-KLR.
 85. The Courts have interfered with qualifying periods in employment law, and probationary contracts, by an improper constitutionalization of the law of contract, and by failure to acknowledge the purposes of qualifying periods laid down by employment law. At the centre of this constitutional thinking, is that every contract of employment must be treated similarly, with no regard to the nature of the contract and in particular, the period of service. It is a universal principle of employment law, that in many cases, qualifying conditions must be fulfilled, before a right can be claimed.



86. There are rights however, which are protected in law, from day one of employment, or even before employment, such as the rights against discrimination, on the grounds specified at Section 5 of the *Employment Act*. An Employee, which term, includes a potential Employee under this provision, is at liberty to present a Claim for discrimination, without any qualifying conditions. One cannot wait for 13 months to claim pregnancy, race or gender discrimination. These are rights which accrue to Employees and potential Employees from day one, or even before employment. They are not affected by the limitation imposed on claims based on probationary contracts.
87. The effect of the declaration of Sections 42 [1] and 45 [3] as being inconsistent with *the Constitution*, is to enable Employees across the board, affirm the right to be heard, and to be given valid reasons for termination of their contracts, even where the relationships with potential and actual Employers, have been for a fleeting moment. Employees who have served for very short periods, have rushed to Court, demanding reinstatement or confirmation to regular employment through orders of the Court. Employees who have worked for a month, have approached the Court claiming they were unfairly dismissed, and seeking reinstatement or compensation equivalent of 12 times, their period of service. Constitutionalization of the contract of employment, has distorted the employer-employee relationship, depriving Parties the requisite space to craft and build a stable, productive, long-term employer-employee relationship.
88. The Respondent went way beyond its contractual and legal obligations, in establishing reasons, to justify extension of probation and termination / non-confirmation of the Claimant's contract.
89. Termination in the end, was fair and lawful. The contract only required Parties to give notice of 1-month or pay salary of 1-month, to terminate the probationary contract.
90. The Respondent paid to the Claimant 1-month salary in notice, at Kshs. 1,200,000, among other benefits, which was in accordance with the probationary contract, and way superior to the minimum notice period of 7 days, or payment of 7 days' wages, prescribed under Section 42[4] of the *Employment Act*.
91. There was no obligation to hear the Claimant and justify termination, the extended probationary period having come to an end, on 10th November 2017. The order of injunction, obtained by the Claimant in her bid to stay on, was overtaken by events, termination having preceded its service upon the Respondent. In any event, it is not the role of the Court to confirm probationary Employees through orders of injunction. Parties must remain free, to disengage from their unconsummated employer-employee relationships. The Court is not able to discern any violation of the Claimant's right to fair labour practices.

It is ordered: -

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA
JUDGE

Mugeria, Lempaa & Kariuki Advocates for the Claimant



Obura Mbche & Company Advocates for the Respondent

