



**Kibaara v LOLC Kenya Microfinance PLC (Cause 1027 of 2016)  
[2023] KEELRC 1448 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1448 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1027 OF 2016**

**B ONGAYA, J  
JUNE 16, 2023**

**BETWEEN**

**LYDIA KANYUA KIBAARA ..... CLAIMANT**

**AND**

**LOLC KENYA MICROFINANCE PLC ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on June 2, 2016 through M/s TO K’Opere & Company Advocates. The claimant’s case is pleaded as follows. She was the founder General Manager and CEO of the respondent which initially was a deposit taking micro-finance company. Her initial employment was from February 1, 2009 under a three-year contract with the role of establishing the management and human resource for the enterprise. The contract expired on January 31, 2012 and the respondent renewed the contract for three further years from February 1, 2012 to January 31, 2015. The contract provided in clause 1(b) thus, “(b) In the event that at the expiry of your contract there shall be on-going work which need to be completed and the Company retains your services for the purpose of completion of such work, this contract shall be deemed to have been extended on then prevailing terms and conditions from month to month until the completion of such work or until otherwise terminated or renewed.” The renewal clause 12 stated:
  - a. Your contract may be renewed for a further term after expiry of this contract on such terms and conditions as may be agreed upon with the Company.
  - b. Unless your contract is renewed it shall be deemed to have terminated. The Company shall not be obliged to renew your contract after expiry.
  - c. Intention to renew the contract shall be communicated to you at least three months before expiry.



2. The claimant's further case is pleaded as follows. In March or April 2010 the respondent company recruited a Finance Manager who was paid about Kshs 50,000.00 higher than her salary and she alleges open discrimination and unfair labour practice. In August 2014 the respondent employed a CEO and Managing Director to take over the respondent's leadership. The claimant was retained as General Manager – Partnership, Relationship, Branch Expansion and Emerging Business reporting the new CEO and she alleges open discrimination and unfair labour practice as the new CEO was performing lesser duties than those previously performed by the claimant as General Manager beyond the claimant's new role. As at September 2014 the claimant earned Kshs 265, 000.00 while the newly recruited CEO earned Kshs 557, 000.00 per exhibited payslips. The new CEO also earned entertainment allowance of Kshs 30, 000.00 and unexplained allowances of Kshs 100, 000.00 per month while the claimant was deducted a monthly parking fee for a slot allocated to the respondent initially Kshs 4, 200.00 per month and increasing to monthly Kshs 8, 120.00.
3. The claimant's further case is that in January 2015 her contract was coming to an end and she wrote on January 26, 2015 requesting for three years' gratuity which was agreed at 25% while the issue of renewal of her contract was under consideration by the Board of Directors. On January 26, 2015 the respondent's Chairman of Human Resource Sub-Committee wrote to the claimant asking her to hand over as her contract of service was lapsing on January 31, 2015. She prepared a handover report dated January 31, 2015. On February 2, 2015, the CEO Mr Mugendi telephoned the claimant conveying the instructions by the Chairman of the Board of Directors that the claimant reports back to work and continue her employment and the claimant reported back promptly on February 4, 2015'. On February 14, 2015 the respondent's Chairman of the Board of Directors wrote to the Chairman of the Board Planning, Governance and Nominating Committee conveying that the Committee could not countermand the full Board decision that the claimant hands over and the Committee could not convey its decision on the claimant's service without the full Board's approval. It is the claimant's evidence that she reported back to work on February 4, 2015 and worked the entire month of February, 2015. She states the Board was due to meet on March 5, 2015 to give further directives on her service but prior to payment of her February 2015 salary, she was advised to go on leave pending further advice. The claimant was informed by the CEO that the Board meeting of March 5, 2015 had not discussed renewal of her contract as it had not been part of the agenda. In May 2015 the claimant visited the respondent and found the Head of Finance had been assigned the previous office space. The claimant handed over the files.
4. The claimant's case is that her last monthly salary was Kshs 265, 000.00 and she was recalled to work in February 2015 and later instructed by the CEO to go on forced leave from March 2015 to May 2015 when she handed over. It is her case that during that period she was not paid her salaries. She claims full salary from February 2015 to January 2016 at Kshs 265, 000.00 per month per payslips exhibited when she was still in the respondent's payroll and making Kshs 3, 180, 000.00. She also claims salary from December 2015 to January 2016 when the respondent failed to communicate the renewal until the letter by the respondent's Company Secretary dated February 12, 2016.
5. The claimant further alleges her termination was unfair and constructively so. She claims damages for discrimination and claims compensation measured as difference of her monthly pay and that of the new CEO from August 2014 to February 2015 making Kshs 2, 044, 000.00.
6. The claimant prayed for judgment against the respondent for orders:
  - a. A declaration that in absence of any formal letter of termination of employment to the claimant by the respondent after the recall of the claimant in February 2015, to resume employment and having worked in February 2015 being on forced leave from March to May



2015 before handing over in May 2015 to await the Board of Directors' resolution which has never been communicated, the claimant remained in the respondent's employment until the end of January 2016 after the demand letter and notice dated January 25, 2016 and the reply of February 12, 2016.

- b. Payment of full salary from February 2015 to January 2016 at Kshs 265, 000.00 per month thus Kshs 3, 180, 000.00.
  - c. Payment of three months' salary in lieu of notice totalling Kshs 795, 000.00.
  - d. Damages for discrimination as claimed Kshs 2, 044, 000.00.
  - e. Damages for unlawful and unfair constructive termination effective February 2016 for a maximum of 12 months' salaries at Kshs 265, 000.00 thus Kshs 3, 180, 000.00.
  - f. Costs of the suit.
  - g. Any other or further relief the Court may deem just and fair to grant in the unique circumstances of the case.
7. The respondent filed on July 13, 2016 the response to memorandum of claim through Messrs Nderitu & Partners, Advocates. The respondent has prayed that the claimant's suit be dismissed with costs. It is pleaded for the respondent to the following effect:
- a. The jurisdiction of the Court is admitted. It is admitted that the respondent employed the claimant initially on a three-years contract and which was renewed for a further term of three years as pleaded for the claimant.
  - b. The position of a CEO existed at inception of the respondent but had not been filled in the infantile stages of the respondent's enterprise.
  - c. The terms for renewal of the contract were per clause 12 of the contract.
  - d. The claimant was fully compensated for her services and it was independent of her alleged securing and delivering the respondent's licence.
  - e. There was no open discrimination as she was not General Manager and CEO at the same time. The Finance Manager negotiated his monthly per his roles. It is breach of privacy to exhibit the Finance Manager's pay slip. The claimant unfairly retained such confidential records. The CEO equally negotiated for his remuneration and benefits. The claimant equally freely negotiated her terms and conditions of service.
  - f. The claimant's salary was increased to Kshs 265, 000.00 on October 22, 2012 at the time the lowest paid employee in respondent's establishment earned Kshs 26, 000.00 a differential of over 10 times and alleged discrimination is not true.
  - g. The position of CEO was for competitive recruitment but the claimant opted not to apply. The CEO's pay slip is exhibited by the claimant in breach of confidentiality.
  - h. The claimant's second term ended on January 31, 2015. She never applied for renewal. Gratuity was paid acknowledging end of contract on January 31, 2015. The contract was not automatically renewable. She was to prepare a hand over report by January 31, 2015 but did so belatedly. The CEO and Board Chairman had no authority to renew the contract. After January 31, 2015 the claimant remained in the respondent's premises because she had failed to



complete handing over but which could possibly be done by January 31, 2015. The claimant knew the CEO could not extent her contract.

8. The claimant filed a reply to defence on August 2, 2016 and repeated her claims as set out in the memorandum of claim.
9. The claimant testified to support her case. The respondent's witness(RW) was Mr Muciimi Mbaka Advocate, the respondent's Company Secretary. The final submissions were filed for the parties. The Court has considered the parties' respective cases and all material on record. The Court returns as follows.
10. First there is no dispute that the parties were in a contract of service. The claimant's last renewal contract was for the period February 1, 2012 to January 31, 2015 for a period of three years in the position of General Manager. The last monthly agreed pay was Kshs 265, 000.00.
11. Second, the evidence is that the contract was lapsing on January 31, 2015. Renewal was at the discretion of the respondent per clause 12 and as submitted for the respondent. The intention to renew the contract was to be communicated to the claimant three months before the expiry and per clause 12(c). The evidence is that such communication was never issued. The Court returns that the contract lapsed by effluxion of time on January 31, 2015 as submitted for the respondent. The letter dated January 26, 2015 by John Nthuku confirms that the contract was lapsing (without suggestion of a renewal) and the claimant had to handover and to get a clearance certificate. The Court finds that allegations of constructive termination were clearly misguided per the respondent's submissions or purely fictitious. The parties had parted on January 31, 2015.
12. Third, was the claimant called upon to continue working after January 31, 2015 to complete some work as on month to month basis as envisaged in clause 1(b) of the contract? The claimant's testimony was that the contract lapsed on January 31, 2015 and the CEO asked her on February 2, 2015 to remain in office. The claimant testified that she worked for about a year without payment. In a contradictory manner during the cross-examination the claimant stated, "My last day at work was on February 28, 2015 when asked to go on leave. I worked upto February 28, 2015 and thereafter went on leave. I was not paid for that one month.... On February 4, 2015 I reported back and worked till February 28, 2015. After February 28, 2015 to January 31, 2016 I did not report to the office. I see February 18, 2015 page C15. Is email on February 18, 2015 at 2.52am. Is the Handover report. I was still working on. I promised to finalise afternoon on February 18, 2015. I see page C16. Is 25.02.2015. I was still working on handover report. I see page C17. I ask about Board decision on my contract and February 2015 Salary. I was not paid February 2015 Salary." The claimant further testified that as at March 2015 she had no contract in place and had no Board contract on her role or remaining in place as General Manager. RW testified that the contract lapsed on January 31, 2015 and thereafter the gratuity was paid and parties separated.
13. The Court has considered the evidence and returns that the evidence is that the claimant was called upon to complete the handing over process in the month of February 2015 as was envisaged in clause 1(b) of the contract and thereafter she left the respondent's service. By her own evidence her last day at work was on February 28, 2015. As agreed it was a month to month contract. It was then a contract terminable by paying a months' salary in lieu of the termination notice per section 35(1) (c) of the [Employment Act](#). Clause 1(b) also required a month's termination notice. The Court considers that in the circumstances the claimant has established payment only for February 2015 plus a month's pay in lieu of notice thus Kshs 530,000.00 less PAYE. While making that finding, the Court considers that it was not in dispute that the CEO called upon the claimant as confirmed by her email of February 25, 2015 that she had completed preparing the relevant report. Further, by email of February 2, 2015, the



claimant was instructed by the CEO to remain in employment until further notice – and the notice never issued thus the award of the one month pay in lieu of the notice. The Court finds that the email by the CEO was sufficient written evidence that the claimant was to remain at work and in absence of a notice, the parties must deem themselves to have separated the date the claimant last worked for the respondent being end of February 2015, although, without the claimant receiving the due notice of termination. It is submitted for the respondent that under clause 10 that the contract could be amended only in writing and signed for the respondent by an authorised person. The Court finds that the calling upon of the claimant by the CEO for the claimant to continue working was not an amendment to the contract but performance of clause 1(a) being retention of the claimant’s services to complete the work of concluding the relevant reports and handing over. The CEO was undisputedly the claimant’s immediate superior and authority in that regard is in no doubt.

14. Fourth, the Court has found that the claimant by her own evidence never worked for the respondent beyond February 28, 2015 and her claims for payment beyond that date are found unjust.
15. Fifth, as to the claimant’s alleged discrimination, the court returns that the Finance Manager and the CEO held distinct posts with distinct negotiated contracts of service. As submitted for the respondent the claimant held the position of General Manager and she had negotiated her agreed terms and conditions of service. The Court finds that discrimination is not established at all in view that there are no comparable circumstances to establish alleged discrimination or unfair treatment - the claimant held a distinct contract of service from that of Finance Manager or CEO. It is not established that the General Manager’s role as held by the claimant was heavier than the subsequent CEO or Finance Manager’s position – and in any event, the evidence was that the positions related to separate contracts of service individually negotiated and nothing was established to suggest overt thing on the part of the respondent to have disadvantaged the claimant as constituting discrimination. It appears that the claimant’s case is not that she was unfairly denied opportunity to hold either of the two positions. Allegations of discrimination and unfair labour practice in that regard are found baseless and not established at all.
16. Sixth, the Court has found that the fixed three-year term of service otherwise lapsed and parties separated. The respondent’s CEO called the claimant to return for a short while to complete the handover and terminal reporting works. The Court considers that recall was specific and the work or purpose of the recall was for a short period invariably ending in the month of February and by her own written correspondence, the claimant confirmed to have completed the purpose of the recall. It would appear to the Court that as the claimant left after February 28, 2015, it cannot be said that some due procedure was needed (beyond the notice, the CEO having promised one) or that the reason for separation was in doubt or unfair, as it was common ground that as at that date, parties were separating because the reporting and handing over works had essentially been accomplished. Thus for avoidance of doubt, that separation did not amount to unfair termination at all. It is that thereafter the claimant sustained correspondence as to suggest pursuit of re-contracting for a contract of service and further employment relationship. While being entitled to do so, feigning the same as continued employment, devoid of assigned duties within the recall clause to complete some work, is found unjust and baseless. The parties effectively separated on 28.02.2015 and the Court has found as much.
17. The Court has considered the claimant’s margins of success and returns that the respondent will pay 50% costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the claimant thus Kshs 530,000.00 less due PAYE by August 1, 2023 failing interest to run thereon at court rates from the date of filing the suit until full payment.



- b. The respondent to pay the claimant's 50% costs of the suit.
- c. The declaration discrimination has not been established in the circumstances and as was alleged for the claimant.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

