



**Ng'ang'a v Rubis Energy Kenya PLC Formerly Kenol Kobil Limited (Formerly KENOL KOBIL LIMITED) (Cause 1296 of 2017) [2023] KEELRC 2381 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2381 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1296 OF 2017  
M MBARÚ, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PETER MWAURA NG'ANG'A ..... CLAIMANT**

**AND**

**RUBIS ENERGY KENYA PLC ..... RESPONDENT  
FORMERLY KENOL KOBIL LIMITED**

**JUDGMENT**

1. The claimant is an adult and the respondent is a limited liability company, formerly known as Kenol Kobil Limited.
2. The respondent appointed the claimant as the purchasing manager through letter dated 1<sup>st</sup> November 2001 at a wage of Ksh. 20,591 per month. The claimant was promoted through letter dated 3 March 2005 to the position of accounts assistant in the accounting & finance department. Through letter dated 12 February 2013 the respondent promoted the claimant to the position of chief accountant at the head office in the Accounts & Finance Department.
3. As the chief accountant, the claimant's was entitled to extra work related benefits such as car loan, payment of children school fees, medical cover and social club membership. The claimant took up the car loan scheme and purchased vehicle registration No. KCF 393H which was amortized every month.
4. On 20 September 2016 the respondent promoted the claimant to the position of Group Finance Manager and reporting to the Group Managing Director earning bonuses every year and in the year 2012 the claimant was awarded the runner up overall employee of the year. This was a special recognition given annually to the very best employee out of the over 170 employees of the respondent in Kenya.



5. In the year 2016 the claimant held a meeting with the group chief executive officer (CEO) David Ohana on the fact that the CEO had not paid PAYE on his bonuses or declared the statutory returns on the amount of school fees paid for his children which was unlawful and would put the respondent at logger heads with the tax collector. This was not taken well by the CEO which meant that his take home salary would be less compared to the previous year and this led to an altercation and the CEO started treating the claimant in a condescending manner.
6. In the beginning of the year 2017, the respondent in a bid to cost-cut initiated a scheme of laying off older and longer serving employees and replacing them with younger managers who earned less than what the respondent was spending on the long serving employees including the claimant. The respondent started coercing senior employees to resign or face termination of employment on false allegations.
7. The claimant applied for annual leave for two days for 25 and 26 May 2017 but on 26 May 2017 he received an email from the CEO to extend his leave for another 30 days and that the human resource manager would make the application on his behalf. On the same day, the claimant's official office line was disconnected, his medical cover and the fuelling card both blocked. In the afternoon, the claimant wrote to the directors of the board seeking their intervention on the unfair treatment.
8. Instead, the claimant was issued with notice dated 26 May 2017 suspending him for 36 days on the grounds that this was to pave way for auditors to conduct investigations on allegations relating to fraud within the company.
9. Upon suspension, the claimant sent an email to the Board and noted several action of gross misconduct by the CEO and requested for a fair and impartial hearing.
10. The claim is that on 14 June 2017 the respondent issued the claimant with a show cause notice and notice for disciplinary hearing on 16 June 2016 to answer to various allegations. On 16 June 2017 the claimant responded to the notice and denied knowledge of the allegations made and requested to be issued with documents relied upon since he was still on suspension and he required to respond and attend the disciplinary hearing while prepared.
11. On 12 June 2017 the chairman to the board called the claimant and asked him to resign or he would be terminated in his employment. The claimant then attended the disciplinary hearing on 16 June 2017 and denied any opportunity to defend himself, he was not issued with any documents as requested and on 21<sup>st</sup> June 2017 he was issued with notice of summary dismissal. He was not allowed the right of appeal
12. The respondent then demanded that the motor vehicle that the claimant had purchased under the car loan scheme be returned or it would be reported as stolen. The respondent reported the vehicle as stolen to the police leading to harassment and threats to arrest being issued.
13. The claim is that the summary dismissal was unfair contrary to Article 41 of *the Constitution*, during the period of employment no matter of fraud or warning issued with regard to any matter requiring for suspension and dismissal from employment and for the 16 years of service the claimant had been of exceptional work performance. The respondent has since the year 2013 been using unorthodox means to cut down on its employees who were 350 but now has 170.  
The claimant was last earning Ksh. 418,000.
14. The claim is that there was unfair termination of employment contrary to Section 45 of the *Employment Act*, 2007 (the Act), there were no justified reasons given for summary dismissal contrary



- to Section 43 of the Act, and there was an unfair redundancy meant to reduce employees under the guise of misconduct which was in breach of rules of natural justice and fair labour practices.
15. The claimant is seeking for a declaration that his employment was terminated unfairly, payment of aggravated damages, payment of compensation and the following dues;
    - a. 12 months' compensation at Ksh. 5,016,000;
    - b. Certificate of service;
    - c. Severance pay for 16 years Ksh. 3,344,000;
    - d. 2-month notice pay Ksh. 836,000,.
    - e. The respondent to release Original Log Book for Motor Vehicle No. KCF 393H;
    - f. 45 Leave days Ksh. 895,714;
    - g. Salary for June 2017 Ksh. 418,000;
    - h. Any other order the court may deem just to grant; and
    - i. Costs of the suit.
  16. The claimant testified in support of his case that being a senior officer of the respondent, he became aware of the fact that in the beginning of 2017, the respondent in a bid to cost-cut initiated a scheme of getting rid of its older and serving employees through unorthodox means and replacing them with younger manager and which included his position. 10 top managers left the organisation and filed suits against the respondent and this included the Group Finance Manager.
  17. The claimant testified that on 24 May 2017 the respondent had its AGM where he presented the company financial report and he then asked for 2 days off but before he could return the CEO called him and directed that he should take 30 days' annual leave and the HR manager would assist to place his application in this regard.
  18. While on the allocated annual leave, the claimant noticed that on 26 May 2017 his office phone was deactivated, his fuel and medical card blocked and could not access his office emails. He wrote to the board on these matters since he read malice on the part of the CEO with who he had an altercation with regard to his non-payment of his tax dues. In response the claimant received a suspension notice and disciplinary hearing on 16 June 2017.
  19. The claimant testified that he was alleged to have been involved in the dealership of Kenol Ruiru station which was not true. The station was not associated with him; the dealership is under Anthony Ndirangu a person different from him the listed company directors are other persons including his spouse.
  20. The claimant was also alleged to be running National Oil station which was not true because the dealership agreement was not in his name. During the disciplinary hearing, no material evidence was produced to link the claimant with these companies and to allow him time to prepare his responses and on 22 March 2018 when the respondent filed its response to the claim, it filed these documents which had not been submitted at the disciplinary hearing. This led to unfair termination of employment.
  21. In cross-examination, the claimant testified that the allegations that he was running Kenol Ruiru station is not true. The company name notes the directors as Peter Mwaura Ng'ang'a and Plata Investment Co. And in its certificate of incorporation there are 3 directors which includes his spouse. The licence agreement between the respondent and Kenol Ruiru station is with Anthony Kanyugo



- under whose email communication to the respondent, emanates from the claimant's email address at [nganga.mwaura@gmail.com](mailto:nganga.mwaura@gmail.com) but these emails and contents were fabricated by the respondent.
22. The claimant testified that he had a company involved in sale and buying of fuel at Ol Kalou under National Oil Company in the same trade as the respondent.
  23. The claimant confirmed to the court that he incorporated Super Vision Company on 17 November 2015 with James Cacheri and Edith Kariuki to trade in fuel products. He was issued with the notice to show cause on 14 June 2017 and he submitted his responses.
  24. In response, the respondent's case is that termination of the claimant's employment was fair and the claims made are without merit and should be dismissed with costs.
  25. The claimant's employment with the respondent was governed under his contract and the respondent's Conflict of Interests Policy (COI) but he acted in disregard of the same and his conduct justified summary dismissal
  26. The claimant entered into a car loan agreement with the respondent on 25 November 2015 for purchase of motor vehicle No. KCP 393H and under the agreement he was given Ksh. 2,500,000 and part of the agreement was for him to repay in 60 instalments together with interests of Ksh. 940,721. part of the agreement was that if the claimant left his employment before completing the repayments, he would repay for the vehicle in full but in breach of this agreement, the whole of the balance and interests should stand due and payable.
  27. On 25 November 2015 the claimant executed a mortgage agreement with the respondent for him to take possession of the said motor vehicle in the event of a default in payment or termination of employment. The sum of Ksh. 1,702,096 remained unpaid on the car mortgage at June 2017 and remains due.
  28. The response is also that the claimant was dismissed from his employment with the respondent from his fragrant violation of the COI policy and fraudulent transaction outlined in the internal audit report on June 2017. The respondent engaged its internal auditor to review all financial records of the company, system logs and transactions. As part of senior management, the claimant was aware of these investigations as he was sitting in the board.
  29. On 26 May 2017 the claimant was suspended from duty for 36 days to allow for investigations into various incidences of financial impropriety and breach of fiduciary duties.
  30. Upon receipt of the letter of suspension, the claimant engaged in a smear campaign against the Board making disparaging allegations against the managing director aimed at intimidating and disparaging his character. The investigations concluded and found reasonable cause that the claimant was involved in fraudulent activities against the respondent and on 14 June 2017 he was issued with a notice to show cause but instead of a response, the claimant continued with his smear campaign over unsubstantiated allegations.
  31. The show cause notice particularised the allegations made against the claimant and he was required to attend disciplinary hearing on 16 June 2017. The claimant was informed of his right to bring another employee of his choice at the hearing. On 15 June 2017 the respondent did a letter of reminder to the claimant in this regard.
  32. On 16 June 2017 the claimant wrote to the respondent with his responses to the show cause notice and also attended the disciplinary hearing where he was allowed to make his representations and he conformed the record and signed the COI policy.



33. On 21 June 2017 the respondent issued the claimant with notice of summary dismissal upon finding him culpable of gross misconduct in terms of Section 44 of the Act. There was due process and there were valid reasons to justify such finding. The claimant was found to have been involved in the running of Kenol Ruiru station in breach of the COI policy, involved in the running of a National Oil Service station in breach of the COI policy, involved and are of fraudulent financial transaction between himself, John Gitau Mwathi and Stephen Gituku which was gross misconduct. The response to the show cause notice demonstrated that the claimant was not honest in that he was involved in the running of Kenol Ruiru service station where he had reserved the name of Plata Investment in September 2015 which company was incorporated on 27 October 2015 and a certificate issued and the CR-12 show that the claimant's wife was a director and another director of Plata Investment Company, Anthony Kanyugo entered into a Licence Agreement with the respondent on 5 April 2016 for operation of Kenol Ruiru service station. There is correspondence between the claimant and Anthony Kanyugo and Stephen Gitaku which show the claimant was involved in the running of the Kenol Ruiru service station under Plata Investment.
34. The claimant's conduct was in direct contravention of the COI policy by acting through his spouse to engage in business with the respondent as senior manager.
35. The response is also that termination of the claimant's employment was justified on the grounds of involvement in the running of National Oil service station - Ol Kalao. The claimant incorporated Super Vision Enterprises, a limited liability company on 17 November 2015 and a search conducted prior to the disciplinary hearing revealed that the claimant was a director of the company as at 31 May 2017. Through the company, the claimant was involved in the running of the service station and during the disciplinary hearing he denied being a director of this company which actions were in contravention of the COI policy of the respondent.
36. The claimant was also found to be involved in financial transactions between him and John Gitau Mwathi and Stephen Gituku. Following investigations, it was revealed that there was fraudulent transaction with employees by allocation of credit notes. The claimant fraudulently allocated credit notes by account payable and account recoverable which was in collusion between the marketing and finance sections when the claimant was the chief accountant and then the finance manager.
37. There was breach of confidentiality through connivance and collusion with other employees. On 24 April 2017 the claimant forwarded confidential whistle-blower's email to one of the employees implicated in the fraudulent transactions.
38. In breach of the loan agreement, the claimant refused to return the motor vehicle to the respondent despite requests made for surrender of the same.
39. Upon termination of employment, under the **resignation package** the dues owing were computed and the claims made herein are not justified and should be dismissed with costs.
40. In evidence, the respondent called Evelyn Ambani the human resource officer who testified that she joined the respondent in the year 2017 and is conversant with the claim and authorised to testify. The claimant as the chief accountant of the respondent was responsible for monitoring, approving and controlling finances and in this capacity he was the custodian of all of the respondent's financial information and bound to carry out in the best interests of the company. Upon employment, the claimant was bound under his contract and COI policy under which he was not to engage in any activities, commercial or otherwise, which would be in conflict with the interests of the respondent.
41. In May 2017, the respondent became aware through a whistle-blower of fraudulent dealings that were being conducted in the company by senior staff. In order to verify the information, the respondent



- engaged its internal auditor to conduct a review of all financial records, systems log and transactions approved by the claimant. The claimant as made aware of these investigations and in breach of confidentiality, the claimant forwarded confidential information to another employee involved in collusion to defraud the respondent. To allow for investigations, the claimant was suspended and the outcome of the review was findings that he had acted in conflict of interest and engaged in fraudulent activities. This was gross misconduct and a notice to show cause dated 14 June 2017 was issued and in response, he denied the allegations and on 16 June 2017 he attended a disciplinary hearing when he denied being involved in the running of Kenol Ruiru Service Station or Plata Investment or being involved in Super Vision Enterprises which was running National Oil Service Station at Ol Kalau.
42. The respondent took into account the responses made by the claimant, the proceedings at the disciplinary hearing and a sanction of summary dismissal was found justified and notice issued on 21<sup>st</sup> June 2017.
  43. At the time the claimant was dismissed from his employment, he had a car loan that had not been fully paid. Under the policy, the claimant was supposed to clear the balance due or surrender the vehicle. The amortized amount was Ksh. 1,639,584 to be paid back or return the vehicle which the claimant failed to do.
  44. Upon cross-examination, the witness testified that upon the show cause notice dated 14 June 2017 the claimant replied on 16 June 2017 the same day he was scheduled to attend before the disciplinary hearing and requested to be supplied with the documents relating to the allegations made against him but these were sensitive records of the respondent and instead the particulars were given.
  45. Ms Ambani testified that she was not present at the disciplinary hearing and could not confirm if the claimant had a chance to see the documents he required in support of his case.
  46. The respondent had sufficient evidence facing the claimant with regard to conflict of interest which adversely affected the company. He engaged in financial transaction between him and James Gitau who was defrauding the respondent.
  47. Several other employees were dismissed and they have filed suits against the respondent. These relates to different reasons.
  48. The respondent also called John Ndungu the group auditor and compliance manager who testified that in June 2017, the respondent carried out an internal audit of the accounts payable and accounts receivable sections. The audit revealed grave fraudulent issues involving both marketing and finance sections of the respondent. The audit implicated the claimant of multiple and serious instances of conflict of interest and inappropriate financial transactions.
  49. The audit revealed that the claimant, through a company Plata Investment was running a petrol station in the respondent's franchise being Kenol Ruiru and a search revealed that the directors included his wife. The company name had been reserved by the claimant.
  50. The audit revealed that the claimant was running a competitor's petrol station, National Oil station, Ol Kalau under Super Vision Enterprises Limited, a search reveal that the claimant was a director as of May 2017.
  51. Ndungu also testified that the fraud and collusion between employees in the marketing and finance departments led to a total loss of Ksh. 52,830, 343 as at the time of his investigations. The claimant was found to be involved in inappropriate transactions with employees who he knew or ought to know were involved in defrauding the company.



52. Upon cross-examination, the witness testified that his audit report was presented on 9 June 2017 but it is not dated. This report was the basis upon which the claimant was suspended and the disciplinary process conducted.
53. The disciplinary panel hearing the claimant relied on his report but he did not attend the hearing. No audit questions were sent to the claimant before the report was concluded. The audit department has no employee call ***Benjamin Ngeno. He is not an employee of the respondent.***
54. The respondent has field Mpesa statements of the claimant and third parties extracted from the claimant's lap top which belong to the respondent. There is no Certificate of Production issued.
55. At the close of the hearing, both parties filed written submissions. The submissions are analysed and the issues which emerge for determination can be summarised as follows; whether there was unfair termination of employment; and whether the remedies sought should issue.
56. It is common cause that the claimant was employed under a written contract of employment together with the respondent's policies and regulations especially the COI policy which was incorporated into his employment contract. On 21<sup>st</sup> June 2017 the respondent issued the claimant with notice terminating his employment for gross misconduct and on the reasons that he was involved in the running of Kenol Ruiru service station with Stephen Gituku the company's Rwanda marketing and operations manager and his wife, Jane Waithera Wainaina under a company name, Plata Investments Limited in conflict of interest against the COI policy he had signed on 15 April 2009. Other reasons given for the summary dismissal were that the claimant was involved in running of a National Oil Station at Ol Kalau through a company he had reserved its name and made application under his signature and was a director of Vision Enterprises Limited which was in breach of the respondent's COI policy in operating under a competitor. The claimant was also said to have undertaken fraudulent financial transactions with John Gitau Mwathi a proxy of the company's former marketing manager, Eugene Ngwiri who was previously found defrauding the company and the financial dealings were in breach of the claimant's fiduciary duty as the senior finance manager in the company. The claimant was also said to have fraudulently allocated credit notes by accounts payables and account receivables section which led to the loss of Ksh. 52,830,343.
57. Prior to the summary dismissal, the respondent issued the claimant with notice dated 26 May 2017 suspending him from employment to *pave way for the auditors to conduct their investigations independently. You will be notified if at the end of this period the investigations will not have been concluded. ... kindly note that during the suspension period, you should not report to work. ... you will be required to return the company's computer which is required for use. ...*
58. The evidence by the claimant that upon his suspension his work phone, emails, medical and fuel cards were deactivated and blocked was not challenged. He was removed from the shop floor to allow for investigations.
59. In response to the suspension, the claimant wrote to the Board of Directors and copied Charles Field Marsham and Development Capital Partners. He made various allegations against the CEO.
60. On 14 June 2017, the respondent issued the claimant with a show cause notice over his involvement in the running of Kenol Ruiru service station in breach of the COI policy, involvement in the running of a National Oil station at Ol Kalau under Super Vision Enterprises Limited as a director, undertaking financial transactions with John Gitau Mwathi and Stephen Gituku through fraud and fraudulent allocation of credit notes by accounts payables and account receivables sections. In total there were four main allegations the claimant was required to respond to as these allegations were noted to *amounts to*



*breach of fiduciary duty, your actions amount to abuse of office and gross misconduct as you took advantage of your position to promote your interests for personal gain and to the detriment of the company.*

61. The claimant was then required to attend a disciplinary hearing on 16 June 2017.
62. In response to the show cause notice, on 16 June 2017 the claimant denied all the allegations made against him and denied being in conflict of interests because he was not a director of Plata Investment Limited which was running Kenol Ruiru and demanded to be issued with the dealership agreement in relation to the service station and that his wife was also not a director or running the subject service station. The claimant also denied running or being involved with National Oil Service station, Ol Kalau or being a director of Super Vision Enterprises Limited. With regard to third and fourth allegations, the claimant responded and denied any involvement in financial fraud with John Gitau Mwathi and Stephen Gituku and that the alleged transactions said to have been done through a proxy for one Eugene Ngwiri were not brought to his attention or details thereof given and asked to be furnished with the investigations report in this respect. On the alleged fraudulent allocations of credit notes by accounts and accounts receivable the claimant noted that he was not privy to such matters and asked for more information to be able to defend himself.
63. summary dismissal of an employee is the harshest sanction an employer can issue to the employee. It must be the very last resort based on gross misconduct. Before the sanction can issue, the employee's right to a hearing must be secured in terms of Section 44 and 41 of the Act. The fundamental part being Section 41(2) of the Act which requires that;
  - (2) *Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*
64. The key elements of this section has been defined by the Court of Appeal in the case of **Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment)** to include the following matters that;

*... four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -*

  - a. *An explanation of the grounds of termination in a language understood by the employee;*
  - b. *The reason for which the employer is considering termination;*
  - c. *Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;*
  - d. *Hearing and considering any representation made by the employee and the representative chosen by the employee.*
65. These provisions are therefore not only meant to ensure the employee is given a hearing but also to have all matters and allegations made against him brought to his attention so that he can respond and be prepared before the disciplinary hearing. The right to chose another employee to accompany the subject employee is also secured.
66. This position is affirmed in the case of **Jane Nyandiko -vs- Kenya Commercial Bank Limited (2017) eKLR** that the mandatory elaborate procedure set up under section 41 of the Act, requires



notification, a hearing and consideration of the employee's representations and his co-worker's before termination. Therefore, the process has three aspects, and absence of any one of them will definitely obliterate the fairness of the process leading to the decision to terminate an employee's contract of service or summarily dismissing the employee.

67. In this case, the claimant was faced with serious allegations. As a senior employee of the respondent, the claimant does not deny that on 15 April 2005 he executed and became bound by the COI policy of the respondent.

68. In part, the COI policy defined the following;

*Acquiring or trading in Petroleum Production, Manufacturing, Transportation or Marketing Properties*

And;

*Ownership, directly or indirectly by an officer or employee of a material interest in an enterprise in competition with the Company or its dealers and distributors*

69. Such matters, if undertaken by the employee, these were in conflict of interest with his employment with the respondent.

70. In court, the claimant was cross-examined by the respondent's counsel extensively on these matters of his conflict of interest. He confirmed to the court that;

*Incorporated Super Vision Enterprises Company in the year 2015 on 17 November with James Gacheri and Edith Kariuki.*

71. The Certificate of Incorporation, is indeed issued on 17 November 2015, a date when the claimant was still in the employment and full service of the respondent. At this point he was still bound under the COI Policy he executed on 15 April 2009.

72. Upon the Certificate of Incorporation, the Memorandum and Articles of Association for the company has its three shareholder;

James Maina Gitau with 30 ordinary shares;

Edith Wangui Kariuki with 30 ordinary shares; and

Peter Mwaura Nganga with 30 ordinary shares.

73. The claimant, Peter Mwaura Nganga vehemently denied being the same person listed as a director for Super Vision Enterprises Limited.

74. Under the Articles of Association for Super Vision Investment company, the referenced Peter Mwaura Nganga is noted as the holder of KRA PIN No.A002868396W.

75. The claimant herein, Peter Kariuki Nganga filed his Memorandum of Claim and attached his payment statements at page 67 to confirm his last salary as being Ksh. 418,000 per month. This salary is paid against his PIN No. A002868396W.

76. The similarity in these details cannot be by mistake. Only a single KRA PIN issues to one person.

77. The admission by the claimant in court that he registered/incorporated Super Vision Enterprises Limited on 17 November 2015 while in the service of the respondent then placed him directly in conflict with the very policy he was supposed to safeguard as the Group Finance Manager. The higher



- he ascended, the more his responsibility was in ensuring employees complied with the given policy. The COI was brought to his attention and he acknowledged its context and application on him by executing it on 15 April 2009. the claimant cannot escape the obvious, any breach thereof of the COI was noted as a matter of gross misconduct. Such justified summary dismissal.
78. Even where the COI policy applied on the claimant, Section 44(3) of the Act allow an employer to summarily dismiss an employee who fundamentally breaches his employment contract;
- (3) ***Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.***
79. Further, where an employee conducts himself to the detriment of his employer and causes loss, waste or damage to the employer's property in terms of Section 44(4)(g) of the Act, such is defined as criminal and subject to summary dismissal;
- (g) ***an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.***
80. Upon the claimant incorporating Super Vision Investment Company, he used it to run National Oil Station, Ol Kalau. The employment of the claimant with the respondent was in a company *Acquiring or trading in Petroleum Production, Manufacturing, Transportation or Marketing Properties.*
81. In the Memorandum of Claim filed on 10 July 2017, at pages 68 to 106, the claimant field the Kenol/Kobil Human Resources Policy, 2008. this policy clearly defines the business of the respondent. Under Clause 3, conflict of interest -*Management Employees* is extensively defined to include;
- Any direct or indirect interest in connection with, or benefit from outside commercial activities, which interest might in any way adversely affect the Company or any of its subsidiaries or affiliates, involves a possible conflict of interest.*
- Circumstances in which conflict of interest on the part of an officer or employee would or might arise (and should be reported immediately to Management) include, but not limited to, the following: -*
- Involvement with Suppliers, Contractors or Customers,*
- Acquiring or trading in petroleum production, manufacturing, transportation or marketing properties. Ownership of property affected by Company action or acquired as a result of Company information.*
- Appropriation or diversion of corporate opportunity.*
- Interest in or position with competitor.*
82. These were key matters within the claimant's knowledge as of 17 November 2015 when he incorporated his Company, Super Vision Investment Limited and stated running a service station under a competitor to the respondent, National Oil station.
83. The records and evidence against the claimant in this regard directly implicate him in gross misconduct. His knowledge of such matters cannot extricate him from the charges made against him. When called to respond to such matters he opted to divert attention and attack his CEO and Board. The CEO and the Board were not the ones required to respond to allegations made against the claimant. He was the one under focus and he squandered the chance to exonerate himself.



84. Summary dismissal is found justified.
85. Save from the above, the claimant was alleged to be involved in running Kenol Ruiru service station in breach of contract. He denied these allegations. The respondent produced CR112 for Plata Investment issued on 27 October 2015 and which had a Licence Agreement with the respondent. The shareholders of the company include one Jane Waithera Wainaina. The respondent produced the Statutory Declaration of Jane Waithera Wainaina, wife to the claimant. The Identity Card Number therein, 22107383 and the CR-12 are in tandem with the affidavit by the claimant of 31 January 2008 and his identity card number and the CR-12 details for both Plata Investment and those under Super Vision Investment Limited. The similarities implicate the claimant. His responses to the show cause notice were not honest. Summary dismissal was justified.
86. With regard to alleged involvement in fraudulent financial activities and allocations, Mr Ndungu testified that he conducted internal audit while the claimant was on suspension. He did not contact the claimant with any audit questions. He submitted the audit report on 9 June 2017 with his findings before the claimant could see this report and was not present at the disciplinary hearing to allow the claimant cross-examine him on any matter.
87. Equally, no audit report was issued to the claimant at all. He requested for the details and particulars of any allegations with regard to any alleged fraud and up until his disciplinary hearing, no records were issued.
88. Ms Ambani for the human resource, she testified that;
- ... on every charge, the claimant asked to be furnished with the documents. The documents could not be given to the claimant due to sensitivity concern but these were shown to him.*
- On the conflict of interests on Ruiru Service Station, the claimant was shown the documents... I am not sure the claimant got access to the documents during the disciplinary hearing. I was not present ...*
89. Nothing can be further from the truth. This witness was forthright and honest. The claimant was not allowed a fair chance to see the evidence against him in this regard.
90. Save for the first and second allegations, the third and fourth allegations were without any material prove and ought not to have been applied against the claimant.
91. Cumulatively, on the two main findings that summary dismissal was justified, the sanction issued was lawful and followed the due process.
92. The claimant is seeking notice pay and compensation which are not available in a case where summary dismissal is found justified.
93. On the claim for severance pay, the claimant's case is that in early 2017 the respondent commenced a campaign to reduce its staff in a mission of cost-cutting and hence targeted senior managers through unorthodox means leading to termination of employment and several have filed suits against the respondent including the claimant. As outlined above, the claimant went out and incorporated a company under Super Vision Investment Limited and was running a service station under a competitor National Oil station in Ol Kalau. The claimant was through his spouse, a director of Plata Investment Limited, running Kenol Ruiru service station. The dealership agreement with the respondent for the entity is directly with Anthony Ndirangu Kanyugo but the shareholder beneficiary behind the company title includes the claimant through his spouse directly in breach of this COI policy with the



respondent that he would not directly or indirectly engage in such matter. Where the claimant found himself conflicted, he did not declare such matter.

94. The claim that the respondent engaged in unorthodox manner to lay off employees and hence a claim for severance pay is without foundation.
95. With regard to the release of the original log book for motor vehicle KCF 393H, the claimant was bound under a mortgage agreement upon purchase of the vehicle. Under the agreement he was required to pay within 60 months and where employment terminated for good cause, to pay up the due amount or return the vehicle. Such terms remain binding and the original log book shall issue upon the completion of the owed total price.
96. On the claim for pay for June 2017, employment terminated on 21 June 2017. the claimant was earning Ksh. 418,000 per month and for these days he is entitled to Ksh. 292,600 to be paid less what the claimant owes the respondent.
97. The claim for 45 leave days owed are not addressed in the letter of summary dismissal as how these were to be paid. Leave days are a right under Section 28 of the Act. On the salary of Ksh. 418,000 per month, 45 days' amounts to ksh. 627,000. this shall be offset from what the claimant owes the respondent.
98. Certificate of Service is a legal entitlement under Section 51 of the Act. This should issue upon the claimant undertaking clearance with the respondent as a good practice.
99. With regard to costs, the matter was filed in the year 2017 and for one reason or the other did not conclude until now. Each party to bear own costs.
100. **According, claims made are found without merit save, the claimant shall be paid salary for June 2017 at ksh. 292,600; 45 leave days Ksh. 627,000; Certificate of Service shall issue in terms of Section 51 of the *Employment Act*, 2007; dues payable to the claimant shall be paid upon his clearance of the vehicle loan/mortgage agreement terms; and each party to bear own costs.**
- 101 The file shall be returned to ELRC Nairobi Registry.

**Delivered in open court at Mombasa this 28th day of September 2023.**

**M. MBARŪ**

**JUDGE**

