



**Kaloki v Fracht Kenya Limited (Cause E043 of 2022)  
[2023] KEELRC 2885 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2885 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E043 OF 2022  
SC RUTTO, J  
NOVEMBER 10, 2023**

**BETWEEN**

**IRENE WAMBUI KALOKI ..... CLAIMANT**

**AND**

**FRACHT KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that she was employed by the Respondent to serve as its Managing Director with effect from 1<sup>st</sup> April 2019 on an agreed monthly salary of USD 11,000. According to the Claimant, she diligently executed her duties until 26<sup>th</sup> September 2021, when the Respondent unfairly and unlawfully terminated her services. The Claimant has termed her termination from the Respondent's employment unjust, unfair and unlawful hence prays for the following orders:
  - a. A declaration that the Claimant's summary termination of her employment was wrongful, unlawful and unfair;
  - b. Special damages totaling the sum of USD 185,144 made up as follows;
    - i. 12 months' gross salary as damages for wrongful, unlawful and unjustified dismissal amounting to the sum of USD 132,000;
    - ii. Three (3) months salary in lieu of notice being the sum of USD 33,000.
    - iii. Part of September 2021 salary in the sum of USD 8,400.
    - iv. 32 leave days earned but not utilized in the sum of USD 11,744.
  - c. Costs of the suit.
  - d. Interest on (b) and (c) above at court rates from the date of filing the suit until payment in full.



- e. Any other relief that this Honourable Court may deem fit to grant.
2. The Respondent opposed the Claim through its Response which was amended on 28<sup>th</sup> April 2022 to include a Set-off and Counterclaim. Through its Response, the Respondent has denied the Claimant's assertions that she worked without blemish and executed her duties diligently during her time of employment. In the Respondent's view, the Claimant negligently performed her duties and breached the terms of the contract of employment. The Respondent further avers that the Claimant's termination was lawful and procedurally fair.
3. With regards to the Set-off and Counterclaim, the Respondent avers that the Claimant intentionally breached the Business Purchase Agreement which included a non-solicitation non-compete clause under which she was to cease operations of Edinguele Services Limited of which she was a Director and Shareholder upon commencing employment with the Respondent.
4. According to the Respondent, the Claimant continued to carry on business under the said Edinguele Services Limited while utilizing the Respondent's resources, equipment, personnel, banked all proceeds due to the Respondent and further misappropriated and defrauded the Respondent various monies to the tune of Kshs 43,528,898.96.
5. The Respondent further avers that the Claimant failed to fully hand over its properties when she cleared, including motor vehicle registration number KBV 414C which was part of the asset purchase from Edinguele Services Limited.
6. Against this backdrop, the Respondent has asked the Court to dismiss the Claimant's claim with costs and enter Judgment on the counterclaim for:
  - a. The Claimant to fully hand over the assets of the Respondent in her possession and in particular the motor vehicle registration number KBV 414C.
  - b. The Claimant to fully compensate the Respondent at market value for the motor vehicle registration number KBW 148E.
  - c. The Claimant does fully account for the sum of Kshs 43,528,898.96 misappropriated during her employment with the Respondent.
  - d. The Respondent is entitled to be fully reimbursed by the Claimant the sum of Kshs 43,528,898.96.
  - e. Costs of the suit and counterclaim.
  - f. Interest at court rates on (d) and (c) from the date of filing the Counterclaim until payment in full.
7. In response to the Amended Response, Set-off and Counterclaim, the Claimant denied the Respondent's averments and reiterated the contents of the Statement of Claim in its entirety. Consequently, she asked the Court to dismiss the Respondent's Amended Response, Set-off and Counterclaim, with costs.
8. The matter proceeded for trial on 10<sup>th</sup> July 2023, during which both sides called oral evidence.

#### **Claimant's case**

9. The Claimant testified in support of her case and at the outset, asked the Court to admit her witness statement to constitute her evidence in chief. She further produced the bundle of documents filed together with the Memorandum of Claim as her exhibits before Court.



10. It was the Claimant's evidence that at the time of termination, she had diligently worked for the Respondent for a period of 2 years, 5 months and 25 days without any blemish.
11. She averred that the termination of her employment by the Respondent was unjust, unfair and unlawful and was carried out in the backdrop of malicious intentions and without due regard and consideration to the law, procedure and norm.
12. She further averred that the Respondent terminated her employment without any basis and without any valid and/or sufficient reason(s) or justification for doing so. That further prior to the termination of her employment, she was not given a fair hearing or any hearing at all.
13. That the Respondent humiliated her by making false accusations against her in the letter of termination without giving her adequate opportunity or any opportunity at all to defend herself.
14. She further averred that prior to her unlawful and illegal dismissal from employment by the Respondent, no prior warnings had been relayed to her and no notice of intended termination of employment had been issued to her as required under the law.
15. The Claimant further stated that as a result of the illegal, unfair and unlawful termination of her employment, she suffered abrupt loss of income, trauma and inability to meet her continuing financial obligations as a result of which she suffered damages.
16. The Claimant further contended that before termination of her employment, she was not issued with three (3) months termination notice as provided for under Clause 7 of her Employment Contract. That further, despite working for the month of September 2021, she was not been paid part of her salary for the said month. She further had 32 leave days which were earned during her employment period but not utilized.
17. The Claimant further stated that after unlawfully and unfairly terminating her employment, the Respondent with a view of intimidating her not to take legal action against it, issued her with a demand letter that had more allegations against her, which were not in her termination letter. According to her, this was a clear indication of malice on the part of the Respondent.
18. The Claimant further testified that she was not party to the Business Purchase Agreement dated 6<sup>th</sup> April 2019 and that the same did not relate to her employment.
19. She further stated that the motor vehicle registration number KBV 414 C is her personal property and has never belonged to the Respondent. According to her, she handed over all the property belonging to the Respondent.
20. Closing her testimony in chief, the Claimant asked the Court to allow her claim as prayed and dismiss the Counterclaim with costs.

### **Respondent's case**

21. The Respondent called oral evidence through its Managing Director, Mr. Joram Nyanzi who testified as RW1. He started by adopting the Respondent's Amended Memorandum of Response, Set-off and Counterclaim, his witness statement as well as the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
22. It was RW1's evidence that in 2019 during the Claimant's tenure of employment, the Respondent's parent company, Fracht AG requested her to procure a customs license for the Respondent, its Kenyan company. The customs license was also set to benefit the Respondent's Uganda-based counterpart Fracht UG SMC Limited.



23. That further, the procurement of the customs license was necessitated by the Respondent having been sub-contracting a third party, was incurring high costs and expenses which were not in the Company's best commercial interests. This responsibility was burdened upon the Claimant by virtue of her position in the Respondent's company as the Managing Director.
24. However, for over two (2) years, the Claimant delayed the process whilst giving a myriad of excuses and eventually failed to procure the said customs license and gave more excuses for completing the assigned task.
25. RW1 further stated that on 1<sup>st</sup> September 2021, the Claimant applied for seven (7) days of leave starting September 2021 to 17<sup>th</sup> September 2021. Her supervisor from the Respondent's parent company acceded to her request on the condition that she ensures that licenses, permits and accounts with ports and shipping lines were in good order.
26. The Claimant in blatant disobedience of lawful instructions thereof proceeded on leave without doing so and also without designating another employee within the company to coordinate her responsibilities during her absence or even provide reports to the Respondent's parent company, a clear dereliction of duty and responsibility as the Respondent's Managing Director.
27. It was RW1's testimony that the Claimant further failed and/or neglected to ensure quality service for the Respondent's customers which led to financial losses and damage to its reputation. That further, the Claimant committed the Respondent to a six (6) year office sublease without informing her supervisor or seeking approval.
28. That she further failed to inform and seek approval from the Respondent's parent company of the said sublease which contained terms such as a rental escalation rate of 15% per annum, a rate that is three (3) times above the market rate making the sublease unfavourable to the Respondent and amounted to wastage of company resources.
29. With regards to the Business Purchase Agreement dated 6<sup>th</sup> April 2019, RW1 averred that the Respondent's parent company Fracht AG purchased all the fixed assets, operations, debtors, trademarks, customer list, and goodwill (assets) of Edinguele Services Limited of which the Claimant was a Director and a shareholder for the consideration of USD 160,000 which was promptly paid.
30. That Clause 5 of the Business Purchase Agreement provided that the Claimant was to complete the transfer of all assets to the Respondent by 30<sup>th</sup> April 2019, including the shares held by herself and Guy Edinguele Alain, her co-shareholder.
31. RW1 contended that the Claimant breached the Business Purchase Agreement, in that:
  - i. She never surrendered the assets of Edinguele Services Limited to the Respondent and has continued with the unauthorized use of Motor Vehicle Registration Number KBV 414C, Toyota Prado to the detriment of the Respondent. Further, the Claimant has failed to transfer ownership of the aforementioned Motor vehicle to the Respondent to date despite repeated reminders to do so.
  - ii. She failed to surrender Motor Vehicle Registration Number KBW148E Toyota Hilux Pickup which was part of the assets bought by the Respondent from Edinguele Services Limited. She admitted selling the said Motor Vehicle. This action was never sanctioned by the Respondent and the proceeds of the sale were never banked into the Respondent's bank account. The Respondent



has not seen any document pertaining to the sale as the Claimant has withheld the said transaction documents.

- iii. She failed to surrender office furniture and equipment belonging to the Respondent as purchased from Edinguele Services Limited but instead requisitioned funds from the Respondent, without approval, to purchase new furniture and later claimed it was the furniture paid by the Respondent under the Business Purchase Agreement.
  - iv. She has never transferred shares from herself and Guy Edinguele Alain to the Respondent but has instead continued to carry on business under Edinguele Services Limited without the Respondent's knowledge.
  - v. She operated a secret Bank account with Stanbic Bank in the name of the Respondent which she was the only signatory contrary to the terms of employment and the provisions of the power of attorney dated 28<sup>th</sup> February 2019. From this account, the Claimant utilized various funds by and for the Respondent for her own personal gain rather than for the Respondent's operations and business expansion as intended leading to the loss of funds by the Respondent.
32. RW1's evidence was that the Claimant's employment tenure with the Respondent was filled with negligence and she committed several acts of fraud.
  33. He further averred that the Claimant illegally and without authorization paid herself and/or withdrew monies from the Respondent's bank account(s) in the sum of Kenya Shillings Eleven Million Ninety-Nine Thousand Eight Hundred and Sixty-One (Kshs 11,099,861) as advances in the period of 6<sup>th</sup> April 2019 and 30<sup>th</sup> September 2019.
  34. That further, the Claimant illegally and without authorization paid herself and Edinguele Services Limited the sum of Kenya Shillings Eleven Million Six Hundred and Fifty-Five Thousand Five Hundred and Ten (Kshs.11,655,510/=) out of the Respondent's Advances Account as loan repayments even though no loan was advanced by her to the Respondent.
  35. That the Claimant illegally and without authorization paid herself the sum of Kenya Shillings Five Hundred and Fifty-Five Thousand Six Hundred and Forty-Nine (Kshs 555,649/=) out of the Respondent's shareholders' fund thereby severely depleting shareholder's value.
  36. RW1 further stated that the Claimant illegally and without authorization paid herself the sum of Kenya Shillings Twelve Million Nine Hundred Sixty Thousand Nine Hundred and Sixty (Kshs 12,962,960/=) in the period of 6<sup>th</sup> April 2019 and 30<sup>th</sup> September 2021 as loan repayments even though no loan was advanced by the Claimant to the Respondent to warrant repayment.
  37. The Claimant illegally and without authorization paid herself consultancy fees of Kenya Shillings Six Million Nine Hundred Sixty-Five Thousand One Hundred and Eighteen (Kshs 6,965,118/=) for services not rendered to the Respondent Company. The Claimant was an employee of the Respondent and could not in any way shape or form have been an employee and a consultant at the same time. Her actions amount to double enrichment at the expense of the Respondent.
  38. On 21<sup>st</sup> September 2021, the Claimant illegally paid herself the sum of Kenya Shillings Two Hundred and Eighty Nine Thousand Eight Hundred (Kshs.289,800) disguising the aforementioned payment as owner's drawing.



39. It was RW1's evidence that during her employment with the Respondent, the Claimant took and utilized all her leave days.
40. Closing his testimony in chief, RW1 asked the Court to dismiss the Claimant's claim and enter Judgment as per the Respondent's Counterclaim.

### **Submissions**

41. On her part, the Claimant submitted that she was unfairly and unlawfully terminated from employment. That the Respondent did not have a valid reason to terminate her services and did not follow fair procedure in her termination.
42. Citing the case of National Bank of Kenya vs Samuel Nguru Matonya (2019) eKLR and Liberata Njau Njoka vs Magadi Soda Company Limited (2011) eKLR, the Claimant argued that whereas the allegations levelled against her by the Respondent relate to her performance, the said reason was not valid as the Respondent has not shown any policy and/or practice that it had put in place to measure her performance and further, what measures it had in place to address the said poor performance.
43. It was her further submission that in the event the Respondent had a valid reason to terminate her employment, which she contends is not the case here, fair procedure ought to have been followed, failure to which the termination shall be deemed unfair. Placing reliance on the case of Ol Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR, the Claimant posited that the Respondent did not follow fair procedure in terminating her employment.
44. With regards to the Business Purchase Agreement, the Claimant submitted that this Court has no jurisdiction to hear and determine issues relating to its breach. She further argued that the parties to the said Agreement are not parties to the suit herein.
45. The Claimant further submitted that the Respondent had proceeded to file a new suit against her and Edinguele Services Limited being Nairobi HCCC No. 131 of 2023, Fracht Kenya Limited and Fracht AG vs Irene Wambui Kaloki. That this was after the hearing and before the determination of the instant suit. According to the Claimant, the said case raises similar issues regarding the breach of the Business Purchase Agreement and alleged fraud and misrepresentation hence it follows that the Respondent admits that this Court has no jurisdiction to hear and determine the issues of fraud on her part.
46. It was her further submission that while the Respondent averred that she committed fraud, it has not strictly proved fraud to warrant the issuance of the order sought against her for compensation for the sum of Kshs 43,528,989.96. In support of this argument, the Claimant placed reliance on the case of Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 Others (2015) eKLR.
47. The Claimant stated in further submission that the Respondent ought to have proved on a higher standard that indeed, she had committed fraud.
48. The Respondent on the other hand submitted that among the reasons for termination as contained in the termination letter, was the Accionia contract which actions and omissions by the Claimant brought about losses to the Respondent. The Respondent further posited that in her email dated 21<sup>st</sup> November 2021, the Claimant offered to shoulder the losses that were occasioned. As such, at the time of termination, there were genuine and valid reasons to terminate the Claimant.
49. It was further submitted by the Respondent that its relationship with the Claimant was based on trust as she was its Managing Director while the supervisor was based in Brussels, Switzerland meaning that she was expected to perform her duties and ensure its business thrives with no physical supervision. The



Respondent maintained that the Claimant's actions and omissions went to the root of the employment contract and therefore, it had no other option but to terminate her employment.

50. Referencing the case of *Mwamati vs Karangi Coftea Limited (2022) KEELRC 13195 (KLR)*, the Respondent argued that since the employer-employee relationship was based on trust, once the trust was broken the same went to the root of the employment contract and therefore the Claimant's termination was premised on valid reasons.
51. With respect to its Counterclaim, the Respondent submitted that the Claimant cannot on one hand claim that this Court does not have jurisdiction to hear and determine the dispute relating to its assets that are in her possession but on the other hand, claim that she is entitled to convert its property without any consequences. On this score, the Respondent submitted that part of the employee's clearance was returning the assets that came into the possession of the Claimant by virtue of her position as its Managing Director.
52. In the Respondent's view, the Claimant had adopted a narrow interpretation of Section 12 of the Act without taking into account Article 162(2)(a) of *the Constitution*. To buttress this position the Respondent invited the Court to consider the determination in the case of *Naqvi Syed Omar vs Paramount Bank Limited & another (2015) eKLR*.
53. The Respondent further contended that since the Claimant did not dispute her offer to compensate it for Motor Vehicle Registration Number KBW 184E, it is entitled to compensation at the market rate for the said motor vehicle.
54. As to the report dated 30<sup>th</sup> September 2021, it was the Respondent's position that the same is extensive, contains elaborate particulars and has not been challenged by the Claimant. That therefore, it has proved its Counterclaim on a balance of probability and urged the Court to allow the same.

### **Analysis and determination**

55. Flowing from the pleadings before Court, the evidence on record and the opposing submissions, the following issues stand out for determination: -
  - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
  - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
  - iii. Whether the Respondent has proved its Counterclaim
  - iv. Is the Claimant entitled to the reliefs sought?

### **Valid and fair reason?**

56. Section 43(1) of the *Employment Act* (Act) is the starting point in determining this question. In this regard, an employer is required to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further along the Act, Section 45 (2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove: -
  - a. that the reason for the termination is valid;
  - b. that the reason for the termination is a fair reason-
    - i. related to the employees conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; ...



57. In the case herein, the reasons for the Claimant’s termination were captured as follows in her letter of termination:

“For several months in 2020 and 2021 you have not been providing daily or consistent reports to your supervisor or at all unless your supervisor prompted you to do so. This has caused considerable frustration for your supervisor. In August 2021 your supervisor has been encountering difficulties reaching on telephone with him not being aware of the happenings of the company since you are not providing reports as required. This has caused more frustration at the parent company

On 1<sup>st</sup> September 2021, you applied for 7 days leave starting 9<sup>th</sup> September 2021 to 17<sup>th</sup> September 2021. Your supervisor accepted your request but instructed you to ensure licenses, permits and accounts with ports and shipping lines were in order. You proceeded on leave without doing so also without designating another employee within the company to coordinate your responsibilities in your absence of the activities of the company for the 7 days you were away.

In addition, it is your mandate and responsibility as Country Manager/Managing Director to be diligent and apply your best endeavours to ensure the company's clients are served to the highest standards and provide adequate supervision and leadership for the Kenya team including employees and subcontractors to deliver the quality service and standards for the company's clients. You however failed to do this with Acciona account/client where your leadership was completely lacking and the assignment was handled in a completely unsatisfactory manner leading to the company financial losses and damages of between USD 30'000 -- USD 50'000.

All of the above has happened under your supervision or lack of supervision as the Managing Director. It is your responsibility as Country Manager/Managing Director to act in the best interest of the company. The above facts and events are not in the best interests of the company and have caused frustration at the parent company as it is causing financial losses and exposing the company to reputational risk.”

58. Flowing from the reasons advanced in the Claimant’s letter of termination, it is apparent that she was being cited for negligence and improper performance of duty.
59. The record bears that in her email of 10<sup>th</sup> November 2019, addressed to Mr. Rudi of the Respondent company, the Claimant admitted that she made a huge mistake with Acciona with regards to the storage contract she entered with Blue Jay. She further admitted that at the time of signing the contract, she did not realize the offer was per container and not per number of square meters per month. The Claimant further admitted that the contract she signed with Blue Jay was clearly very high compared to the selling rate. In this regard, she offered to take part on the costing rate as she felt it was not fair for her to let the Respondent company take up losses over her mistakes.
60. In essence, the Claimant was admitting that she performed her duties in an improper and negligent manner and for that reason, offered to shoulder the attendant costs. According to the letter of termination, the Claimant’s actions in this regard resulted in the company suffering financial losses and damages between USD 30,000 to USD 50,000.
61. Section 44(4) of the Act provides for acts and omissions that may amount to gross misconduct. Of relevance to this case is clause (c) which provides as follows: -



44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...

.....

(c) an employer will be justified for dismissal if an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

62. Fundamentally, where an employee is negligent, careless, or performs his or her work improperly and as a result the employer suffers loss, injury or damage, the Act allows the employer to summarily dismiss such an employee from his or her employment. This is subject to adherence to the requirement of a fair hearing which I shall shortly address.

63. Applying the aforesaid provision to the instant case, it is evident that the Claimant's improper performance of duty with regard to the Respondent's client, Acciona, rendered her liable to dismissal from employment. This is further coupled by the fact that the Respondent suffered losses as a result of the Claimant's actions and omissions.

64. To this end, it is my finding that by her own actions and omissions, the Claimant availed the Respondent a valid and fair reason to terminate her employment. I must point out that, that reason alone was sufficient to trigger the termination process.

#### **Procedural fairness?**

65. The requirement to apply procedural fairness in cases of termination is generally provided for under Section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided for under Section 41 of the Act. In this case, an employer is required to notify an employee of the intended termination in a language he or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her.

66. In the instant case, there is no evidence let alone a suggestion from the Respondent's end that it undertook the process contemplated under Section 41 of the Act. As a matter of fact, RW1 admitted that the Claimant was not taken through a disciplinary process. Seemingly, she was simply let go without much ado.

67. On this score, I will follow the determination of the Court of Appeal in the case of Kenfreight (E.A.) Limited vs Benson K.Nguti [2016] eKLR, where it was held as follows:

“ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.”

68. Therefore, in as much as the Respondent had a valid and fair reason to terminate the Claimant's contract of employment, it was bound to afford her a fair hearing and allow her to give her side of the story prior to such termination. That was a mandatory process and the Respondent was at fault for not complying with the provisions of Section 41 of the Act.



69. Flowing from the above, it is evident that there was a fundamental flaw in terms of the procedure and ultimately, the Claimant's termination was unlawful.

### **Whether the Respondent has proved its Counterclaim**

70. As stated elsewhere in this Judgment, the Respondent lodged a Set-off and Counterclaim partially based on a Business Purchase Agreement executed on 6<sup>th</sup> April 2019. Both parties have adopted different positions with regard to the jurisdiction of this Court to hear and determine the claim with respect to the Business Purchase Agreement.
71. On this account, I find it imperative to first determine the jurisdictional question before addressing the second part of the Counterclaim relating to reimbursement of the sum of KShs 43,528,898.96, allegedly misappropriated by the Claimant.

### **i. Jurisdiction of the Court to hear and determine the claim relating to the Business Purchase Agreement**

72. According to the Respondent, the Claimant breached the Business Purchase Agreement in that she continued to carry on business with Edinguele Services Limited while still in its employment while utilizing its resources, equipment and personnel and banking all the proceeds due to it. The Respondent further stated that the Claimant failed to hand over motor vehicle registration number KBV 414C which was part of the Asset Purchase from Edinguele Services Limited. On the same note, the Respondent averred that the Claimant sold motor vehicle registration number KBW 148E without authority.
73. Reviewing the Business Purchase Agreement executed on 6<sup>th</sup> April 2019, it bears to note that the same was entered into by the Respondent as the buyer, and Edinguele Services Limited as the seller. The Claimant signed the Agreement on behalf of Edinguele Services Limited in her capacity as a principal shareholder. The gist of the Agreement was that Edinguele Services Limited was to sell, convey, assign, deliver and transfer to the buyer its logistics business conducted at its premises in Nairobi.
74. Clause 9(c) of the Agreement provided for transfer of the assets listed under Annex A, to the Respondent. The assets to be transferred included motor vehicle registration numbers KBW 148E, KBV 414C, KCR 221X, all office equipment and furniture.
75. In its Counterclaim, the Respondent has sought to recover motor vehicle registration number KBW 148E and compensation at market value for motor vehicle registration number KBV 414C.
76. As stated herein, the Business Purchase Agreement was executed by the Respondent and Edinguele Services Limited. This was a separate agreement from the Employment Contract which was executed by the Claimant (on her own behalf) and the Respondent. Therefore, it is evident that the dispute with regard to the Business Purchase Agreement constitutes a commercial agreement thus falling outside the jurisdiction of this Court in light of the provisions of Section 12 of the *Employment and Labour Relations Court Act* (ELRC Act).
77. Indeed, the mere fact that the said Business Purchase Agreement was executed separately from the Claimant's Contract of Employment, further confirms that it was not connected to her employment with the Respondent. In the event the contrary was true, it follows that the parties would have executed one contract and expressly provided as much.



78. Undoubtedly, in terms of Section 12 of the ELRC Act, this Court has jurisdiction to hear and determine matters relating to employment and labour relations. I must say that the issues raised in the Counterclaim with respect to the Business Purchase Agreement are not such matters.
79. On this issue, I cannot help but find that this Court lacks jurisdiction to hear and determine the Respondent's Counterclaim in so far as it relates to the Business Purchase Agreement.
80. What's more, Edunguele Services Limited is not a party to the instant suit and that being the case, it follows that no order can issue against it.
81. To this end, the Counterclaim relating to the handover of motor vehicle registration number KBV 414C and the claim for compensation for motor vehicle registration number KBW 148E, cannot be sustained.

**ii. Reimbursement of the money allegedly misappropriated by the Claimant from the Respondent company**

82. The Respondent has further sought to recover from the Claimant the sum of Kshs 43,528,898.96 which it alleges she misappropriated during her employment.
83. In support of its case, the Respondent exhibited a Special Audit Report dated 30<sup>th</sup> September 2021, containing a summary of payments made to the Claimant as advances totalling the sum of Kshs 555,648.99. It also contains a schedule of loan repayments made to the Claimant totalling the sum of Kshs 12,962,960.00.
84. Further, the Report contains a schedule of payments made to the Claimant as Consultancy fees totalling the sum of Kshs 6,965,118.96.
85. As it is, the information contained in the Special Audit Report was generated from a different source, for instance, bank statements, cheques or payment vouchers. Notably, the Respondent did not exhibit the primary source from which the information contained in the Special Audit Report was extracted. In this regard, the Respondent failed to adduce cogent evidence showing actual movement of funds from its bank accounts to the Claimant's bank accounts.
86. This being a case where fraud was alleged on the part of the Claimant, the Respondent was required to prove the same to the required standard.
87. As was held in the case of *Kinyanjui Kamau vs George Kamau Njoroge* [2015] eKLR, allegations of fraud must not only be strictly pleaded but proved. The Court further relied on the determination in the case of *Ndolo vs Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that the standard of proof required in cases of fraud and forgery is much higher than that required in ordinary civil cases, namely proof upon a balance of probabilities but not one beyond a reasonable doubt as in criminal cases.
88. Further in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, it was held that fraud must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
89. In this case, the Respondent did not do enough to satiate the standard of proof by proving that the Claimant engaged in acts of fraud by paying herself monies without authorization from the Respondent's funds. It was not sufficient for the Respondent to compile a report and exhibit the same without providing back up evidence to ascertain that its contents are accurate.



90. In a nutshell, the Respondent did not provide cogent evidence to prove the actual allegations of fraud against the Claimant.
91. For the foregoing reasons, the Counterclaim with regards to the sum of Kshs 43,528,898.96 alleged to have been misappropriated by the Claimant fails for want of proof.

### **Reliefs?**

92. As the Court has found that the Claimant's termination although substantively justified was procedurally unfair, she is awarded three (3) month's salary in lieu of notice in terms of Clause 7 of her Employment Contract and compensatory damages equivalent to one (1) month of her gross salary. This award takes into account the length of the employment relationship and more importantly, the Claimant's own contribution to her termination from employment.
93. The Claim with regards to the salary for the month of September 2021, is allowed as the Respondent has also conceded that the Claimant is entitled to the same.
94. The Claimant has prayed for payment in lieu of unutilized 32 leave days. However, she did not state the period for which she is claiming the leave days, seeing that her contract of employment provided for the statutory leave period which is 21 days. Noting that the Respondent also failed to avail the Claimant's leave records in line with its obligations under Section 74(1) (f) of the Act, she is entitled to leave pay which shall be limited to a period of 18 months preceding her exit from the Respondent's employment. This is pursuant to Section 28(4) of the Act.

### **Orders**

95. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent and she is awarded: -
  - a. Three (3) month's salary in lieu of notice being the sum of USD 33,000.
  - b. Compensatory damages in the sum of USD 11,000 being equivalent to one (1) month of her gross salary.
  - c. Unpaid leave covering 18 months being the sum of USD 11,550.
  - d. Salary for the month of September 2021 being USD 8,400.
  - e. The total award is USD 63,950.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
  - g. The Claimant shall also have the costs of the suit.
96. The Counterclaim is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**STELLA RUTTO**

**JUDGE**

### **Appearance:**

For the Claimant Mr. Haggai instructed by Mr. Wesonga

For the Respondent Mr. Onyancha instructed by Mr. Mwoma



Court Assistant Abdimalik Hussein

## **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

