REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 231 OF 2020

ALVIN OTIENO.....CLAIMANT

VERSUS

OMYA EAST AFRICA LIMITED.....1ST RESPONDENT

OMYA INTERNATIONAL AG.....2ND RESPONDENT

JUDGEMENT

1. The claimant was initially engaged as a consultant by the 2nd respondent, with effect from 1st January, 2016 for a period of 3 years. During the period he was engaged as a consultant, the claimant and the 2nd respondent entered into a separate car loan agreement dated 27th January, 2016.

2. The claimant was later absorbed as an employee of the 1st respondent, which is a 100% subsidiary of the 2nd respondent. The employment contract which is dated 1st November, 2019, backdated the claimant's employment to 1st January, 2016. Subsequently, the claimant assumed the position of Agronomist East Africa in consideration of a monthly salary of Kshs 450,000/=.

3. The claimant avers that he served the respondents diligently and with prowess, thus earning himself bonuses for the years 2016, 2017, 2018 and 2019.

4. Apparently, the employment relationship took a nose dive on 28th April, 2020, when the claimant's employment was terminated. He has termed the termination as unlawful, unprocedural and unfair hence seeks compensatory damages; payment of accrued leave days; three months' salary in lieu of notice; severance pay; and a declaratory order that the motor vehicle bearing Registration Number KCH 056B legally belongs to him.

5. The respondents opposed the Claim and filed a joint Memorandum of Response as well as a Counterclaim. The respondents aver that the claimant was merely referred to as a consultant prior to 1st November, 2019 but in actual sense, was an employee of the 2nd respondent. That subsequent to the incorporation of the 1st respondent as a legal entity in Kenya, the claimant's status as an employee was regularized.

6. The respondents deny the claimant's allegations that he was diligent and that he carried out his work with prowess. The respondents aver that on the converse, the claimant performed his work poorly and was not meeting his performance targets, despite being given room to improve. That as such, his employment was terminated.

7. It is the respondents' further averment that the claimant was obliged to return the motor vehicle in question upon termination of the contract of employment. Indeed, it is on the foregoing basis that the respondents have lodged a Counterclaim against the claimant through which they seek an order compelling him to return the motor vehicle make; Chevrolet Trailblazer 2.8 cc bearing registration number KCH 056B (hereinafter referred to as the motor vehicle) and in the alternative, an order that he repays the full purchase price of the motor vehicle being Kshs 5,000,000/=.

8. The matter proceeded for hearing on three diverse dates, to wit, 22nd September, 2021, 3rd November, 2021 and 15th December, 2021 when both parties called oral evidence in support of their respective cases.

Claimant's case

9. At the commencement of the hearing, the claimant adopted his witness statement dated 3rd June, 2020 as well as his bundle of documents to constitute part of his evidence in chief. He also produced the said bundle documents as exhibits before court.

10. It was the claimant's testimony that he is an Agronomist by profession and was contracted by the 2nd respondent on 1st January, 2016, to render consultancy services for a period of three (3) years. That while engaged as a consultant, he entered into a separate agreement for the purchase of a motor vehicle with the 2nd respondent. That as per the terms of the said car loan agreement, the 2nd respondent was to facilitate the acquisition of the said motor vehicle for his use and was to be owned by him as a consultant.

11. It was the claimant's testimony that he worked as consultant until 1st October, 2019, when the 2nd respondent set up a new company, which is the 1st respondent herein. That due to his diligence at work, he was employed by the 1st respondent and his employment backdated to 1st January 2016.

12. The claimant averred that he worked for the 1st respondent until 20th April, 2020 when he received a letter terminating his employment, with the reason for his termination being cited as failure to meet his performance targets.

13. It was the claimant's further testimony that he had never failed to perform and achieve his targets as demanded, and that he was not summoned at any particular time by the respondents, to discuss his performance. He further told court that he was not paid terminal dues following his termination.

14. As regards the car loan agreement, the claimant testified that the said motor vehicle was to be purchased by the respondents and as per his understanding, its value was to be fully amortized after a period of five (5) years. That at the time of his termination, he had been in possession of the motor vehicle for a period of four (4) years four (4) months and at the time, its amortized value was Kshs 666,667/=. It was therefore his expectation that the said sum would have been reduced from his terminal dues. He maintained that the motor vehicle was at all times registered under his name and indeed, was one of the incentives for him to take up the job as he was set to enjoy its use during the amortization period. That all along, he knew that the motor vehicle belonged to him and that the controversy only arose at the time his employment was terminated.

15. During cross examination, the claimant reiterated that the motor vehicle in question was bought by the 2nd Respondent for his use. That the respondents' Vice President, Mr. Frederic Bonne had informed him that the amortized value of the motor vehicle would be reduced from his gratuity. The claimant admitted that ordinally, he would personally cater for costs related to the maintenance and insurance of the motor vehicle and thereafter, he would be reimbursed by the respondents.

Respondent's case

16. The respondents called oral evidence through, the General Manager of the 1st respondent, Mr. Francis Kirema, who also adopted his witness statement to constitute part of his evidence in chief. Mr. Kirema also produced the documents filed on behalf of the respondents as exhibits before Court. It was his testimony that he joined the 1st respondent in 2018 and was the claimant's immediate supervisor. That at that time, all operations were under the 2nd respondent but upon incorporation of the 1st respondent, there was a switch. That it was then that the claimant was employed by the 1st respondent and as such, he was being paid a salary every month and had performance targets and objectives, which were agreed on yearly.

17. Mr. Kirema further testified that he was aware of the car loan agreement between the claimant and the 2nd respondent. That the 2nd respondent had purchased the said motor vehicle and registered the same under the claimant's name. That at that time, the 2nd respondent had no legal status in the country hence could not register the motor vehicle in its name and the 1st respondent was yet to be incorporated, hence the reason the motor vehicle was registered in the claimant's name. That nonetheless, the motor vehicle remained the property of the 2nd respondent and it was strictly to be used as per its car policy.

18. It was his further testimony that as per the car loan agreement, the claimant was required to return the motor vehicle to the respondents, or pay the amortization value of the loan, in the event of termination of employment. He further stated that the respondent had the first right to ownership of the motor vehicle but in the event the respondents did not need the same, then the driver, who is the claimant, would have been given the first priority to purchase it. He told court that the respondent still requires the motor vehicle hence its Counterclaim. He added that the claimant's expenses for insurance and maintenance of the motor vehicle were fully reimbursed.

19. As regards the claimant's termination, Mr. Kirema testified that the termination was on the basis of poor performance. That as his immediate supervisor, he was responsible for reviewing the claimant's performance and which reviews were undertaken twice per year, that is mid-year and end year. It was his testimony that the claimant was underperforming since 2016 and actually worsened in 2019. He further told court that he sat down with the claimant several times and advised him as much. That the claimant was also aware that the consequences of poor performance was summary dismissal. That the claimant was aware that he was on a performance improvement plan but nonetheless, his performance deteriorated thus resulting in his termination.

20. He further stated that payment of bonus is based on employee contribution (50 %) while 50% is based on the company performance. That in this case, the claimant only received 50% as he had not performed as expected.

21. During cross examination, Mr. Kirema maintained that the claimant was dismissed for non-performance and he was well aware of the same. That the claimant was also aware that he had been given 3 months to improve his performance. He stated that though he did not have the minutes in respect of the review meetings with the claimant, the meetings actually took place. He admitted that the claimant's terminal dues were yet to be paid but added that there was good reason for the same, being that he was yet to return company property.

22. In further cross examination, Mr. Kirema testified that as per the car loan agreement, the claimant was to pay a certain amount every month towards the motor vehicle as it was given on loan and not a grant. That as such, he was to settle the loan otherwise it would remain the property of the respondents. That having failed to make such payments, the motor vehicle remained the property of the respondents.

Submissions

23. The claimant submitted that he was neither given a three (3) months' notice as required under his employment contract nor was he given a hearing hence his termination was unfair, unlawful and unprocedural. In support of his submissions, the claimant placed reliance on the cases of **Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR** and **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2013) eKLR**.

24. It was further submitted on behalf of the claimant that the respondent had not proved the allegation of underperformance. Reliance was placed on the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017) eKLR.**

25. The claimant further submits that he has rightful ownership of the motor vehicle since it is still registered in his name and on account of the amortization period as well as the remaining car value proposed, he has since paid the amount proposed by way of set off from dues owed to him by the respondents. On this score, he cited the provisions of **Section 8 of the Traffic Act Cap** as well the case of **Arun C. Sharma vs Asiiana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 Others (2014) eKLR.**

26. On the other hand, the respondents ssubmitted that the claimant's termination was pursuant to his employment contract and section 36 of the Employment Act. The respondents further submitted that there was a good and valid reason for the claimant's termination and that in so doing, had complied with the procedure stipulated under section 41 of the Employment Act. The respondents invited the Court to consider the findings in the case of **George Okello Munyalo vs Unilever Kenya Limited (2019) eKLR, Thomas Sila Nzivo vs Bamburi Cement Limited (2014) eKLR** and **Consolata Kemunto Aming'a vs Milimani High School [2019] eKLR**.

27. The respondents further urged that under section 41 of the Employment Act, there was no express requirement for an oral hearing. To support this position, it cited the case of **Jacob Oriando Ochanda vs Kenya Hospital Association t/a Nairobi Hospital (2019) eKLR** and **Kenya Revenue Authority vs Menginya Salim Murgani.**

28. It was the respondents' further submission, that they were the owners of the motor vehicle since the claimant took possession of the same in his capacity as an employee and per the car loan agreement and that following his termination, he was to surrender the same. It fortified its submissions with several authorities including **Ready Mixed Concrate (South East Ltd vs Ministry of Pensions and National Insurance (2010) BT 49**. That the 2nd respondent had proved that it purchased the motor vehicle while the claimant had not produced any evidence to demonstrate payment towards its purchase. That as such, it had proven its Counterclaim against the claimant.

Analysis and determination

29. Upon evaluation of the issues arising from the pleadings, the testimonies before court and the submissions on record, this court is being called upon to resolve the following questions: -

a. Was there a valid and fair reason for the claimant's termination?

b. Was the claimant's termination in accordance with fair procedure?

c. Who is the rightful owner of Motor Vehicle Make: Chevrolet Trailblazer bearing Registration Number KCH 056 B?

d. Is the Counterclaim justified?

e. Is the claimant entitled to the reliefs sought?

Was there a valid and fair reason for claimant's termination?

30. Section 45 (1) and (2) (a) and (b) of the Employment Act makes the following provisions regarding termination of employment–

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer 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 employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

31. Flowing from the above statutory provision, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of a valid and fair reason(s).

32. Instructively, the foregoing provisions must be read together with section 43 (1) of the Employment Act which places the burden of proof

on the employer. It provides as follows;

> **"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45".**

33. In the instant case, poor performance has been cited as the reason for the termination of the claimant's employment. This can be discerned from the letter of termination dated 28th April, 2020, which refers to *"unfulfillment of expected performance"* as being behind the separation.

34. On his part, the claimant has denied the allegation of poor performance. In his testimony before court, he admitted that he had achieved some targets while others were partially achieved. He further contended that he earned bonuses for the years 2016, 2017, 2018 and 2019 which proves that his performance was above board.

35. The respondents disagree and to this end, produced in evidence the claimant's performance review appraisals in respect of 2019.

36. The said performance appraisal report which is a summary of the objectives against the progress achieved, provides in part: -

> "1. Push to achieve total prills sale of 3.65 K DMT for East Africa……..**Not achieved**
>
> 2. To make first prills sales in Tanzania, Rwanda and Ethiopia……..**Not achieved. NO sales in Rwanda, Ethiopia and Tanzania target not met.**
>
> 3. Sign up a distributor and complete the products registration in Ethiopia and Rwanda by end of Q3……**Not achieved. Agreement with Chemtex only for product testing. Product registration not started.**
>
> 4. Establish a solid working relation with Triachem, Amiran and The Balton group, gain a deep understanding of their business and implement an elaborate performance management framework with all the targets deliverables and timelines agreed upon……. ……**Partially achieved. Deliverables by distributors not achieved.**
>
> 5. To carry out at least 1 Calciprill launch in Uganda, Tanzania, Rwanda and Ethiopia……**Partially achieved. No launch in Rwanda, Ethiopia and Tanzania.**
>
> 6. Develop and launch Omya pro in a strategic market segment with first sales recorded before year end……**Not achieved**
>
> 7. Develop and implement a clear marketing plan that guarantees smooth distribution from Lachlan and increase the product presence in the market……**Not achieved. No smooth transition from Lachlan to Amiran. Did not continue sales that were done by Lachlan to the cereals sector.**
>
> 8. Engage NGOs, CBOs and Government agencies in the emerging Markets of Tanzania, Rwanda, Ethiopia with a sole target of having Omya products portfolio placed on the recommendation list that mature to First sales by Q4**……Not achieved. No real engagement with NGOs, CBOs or govt agencies seen. No product recommendations seen. No sales generated.**
>
> 9. Solidify partnership with two new fertilizer blenders in the region culminating into a sale before year end……**Not achieved."**

37. Based on the above performance appraisal report it is evident that the claimant did not achieve most of his performance targets.

38. The claimant did not question the accuracy of the performance appraisal results and as a matter of fact, attached the same as part of his documents which he produced as exhibits before court. The court therefore deems the same as factual and an accurate reflection of the claimant's performance during the period under review.

39. The claimant has defended his performance and justified that the same was above par hence the basis for the bonuses he earned.

40. The respondents opine otherwise and state that the bonuses were paid based on personal performance at 50% and company performance at 50%. That in this case, the claimant only received 50% bonus, being in respect of the company performance. That in regards to his personal performance, the bonus earned was 0%.

41. The claimant's employment contract provide as follows in respect of the bonuses;

> "In addition to the above mentioned salary, you will be entitled to an annual bonus, based on individual performance and on business performance. This bonus will amount to 0-30% maximum of the base annual salary per annum. 50% of the bonus is dependent on the achievement of personal objectives and individual performance. The other 50% are dependent on the business performance."

42. This lends credence to the respondent's assertions, that the bonus was based on the company and individual performance at 50%:50%. As

such, the claimant cannot attribute the bonus payment on his individual performance.

43. Further, the document titled *"Standard Salary and Bonus Review Sheet"*, which was produced by the respondents in evidence, provides as follows under the head **"Evaluation of Personal Objectives**": -

> "Achieved: 20%
>
> Almost achieved: 20%"

44. In light of the foregoing, it is evident that the respondents have demonstrated that the claimant's performance was not as expected hence unsatisfactory. As such, the respondents had a valid and fair reason to terminate the claimant's employment on account of poor performance and the Court finds as such.

45. Having found as much, the next question for determination is whether the respondents subjected the claimant to a fair process prior to terminating his employment.

Was the claimant's termination in accordance with fair procedure?

46. Pursuant to section 45 (2) (c) of the Employment Act, an employer is required to subject an employee to fair procedure prior to terminating his or her employment. Section 41 of the Employment Act provides in a sequential manner, the requirements to be complied with in order to achieve fair process. It's in the following manner: -

> **"(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
>
> **(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."**

47. The claimant has contended that his termination was not in compliance with the principles of natural justice and fair process. The respondents on the other hand state that the claimant was aware of his poor performance having been notified as much by his immediate supervisor. On this score, the respondents submitted that the performance review report acted as notice as it elaborated the reasons why he was not fit for the task.

48. The respondents have sought to rely on email communication of 12th February, 2020, from the claimant's supervisor to the claimant, through which his final performance review was forwarded. It states as follows: - **"find attached as discussed."**

49. It bears to note that the notice contemplated under section 41(1) of the Employment Act is one that is explicit and which clearly notifies an employee that the employer is considering terminating his employment, on account of the specified reasons.

50. By all means, the brief statement sought to be relied on by the respondents does not fit the notice contemplated under section 41(1) of the Act. It does not and cannot suffice in the circumstances. The same is merely a forwarding note of the claimant's final performance review. It does not indicate in any form or manner, that it is a precursor to the claimant's termination.

51. A notice contemplated under section 41 (1) of the Employment Act ought to be express and acts as a signal to an employee that all is not well in the employment relationship for one reason or the other, hence requiring him or her to respond explain why his employment should not be terminated for whatever reason.

52. In the instant case, there is no evidence that the claimant was asked to demonstrate why his termination should not be effected based on poor performance.

53. The respondents' witness, Mr. Kirema, alluded to several meetings he held with the claimant with regards to his performance, but did not adduce evidence to that effect. Such review meetings ought to have been documented.

54. Further, it was mandatory to require the claimant to defend his performance either in writing or verbally in a disciplinary hearing. This was not done. It was erroneous for the respondents to assume that the results of the claimant's performance appraisal were an end in itself and that it was not necessary to subject him to another process.

55. Upon noting the dismal results from the claimant's performance appraisal, it ought to have moved a step further and subjected him to the process stipulated under section 41(1) of the Employment Act. Anything short of that process, fell below the legal parameters established under sections 45 (2) (c) and 41 of the Employment Act.

56. The respondents submitted that a hearing under section 41 (1) need not necessarily be oral in nature. Granted. Where was the documentary evidence, demonstrating that the process of fair hearing was fulfilled albeit through correspondence? There was none.

57. As a matter of fact, there is no communication on record, requiring the claimant to explain in writing why his employment should not be terminated based on poor performance.

58. The Court of Appeal in **the** case of **National Bank of Kenya vs Samuel Nguru Mutonya [2019] eKLR held** as follows: -

> **"The reason advanced by the Bank for terminating the respondent's employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;**
>
> > **"a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.**
> >
> > **b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.**
> >
> > **c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.**
> >
> > **d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."**

59. Further, in the case of **Naumy Jemutai Kirui vs Unilever Tea Kenya Limited [2020] eKLR** the court stated as follows:

> **"Before the employer can be found to reply on the provisions of section 43(2) with regard to sorely relying on having *genuine reasons existing* to justify termination of employment, the due process of the law dictates that the employee must be notified of her poor performance as an issue forming the basis of reasons for which the employer *is considering termination* of employment and thus allow the employee to give her defences in the presence of another employee of choice.**
>
> **Upon the end of the PIP process, the employer must invoke the law by allowing the employee an internal process to address poor performance before termination of employment as the PIP contextualised is meant to give support to the employee to ensure work improvement. The PIP as a tool is not part of the disciplinary process."**

60. Based on the above determinations which I adopt and reiterate, I arrive at the conclusion that the respondents have failed to prove that the claimant was subjected to a fair process prior to termination of his employment.

61. In the circumstances, I cannot help but find that the claimant's termination was unfair within the meaning of section 45 (2) (c) of the Employment Act.

Who is the rightful owner of Motor Vehicle Make Chevrolet Trailblazer bearing Registration Number KCH 056 B?

62. It is notable that this issue formed the basis of the respondents' Counterclaim hence its determination will ultimately resolve the Counterclaim.

63. Both parties have laid claim to motor vehicle **Make Chevrolet Trailblazer bearing Registration Number KCH 056 B.** The claimant has based his claim on the following: -

i. The car loan agreement dated 27th January 2016;

ii. The log book in respect of the motor vehicle;

iii. The motor vehicle search results; and

iv. an email dated 23rd April 2020 from the respondents' Vice President- Human Resource, Mr. Frederic Bonne to Mr. Kirema indicating the approximate value amount to be paid by the claimant as the reimbursement in consideration for the motor vehicle.

64. The claimant states that the agreement provided that in case of termination, he would return the motor vehicle to the respondents or pay its remaining value, which he maintains is the sum of Kshs 666,667/=. That the car loan was executed as a benefit in his consultancy relationship with the 2nd Respondent and that at all material times, the vehicle has been registered in his name.

65. On the other hand, the respondents aver that the motor vehicle remains their property and that the claimant ought to return the same. That the car loan agreement was clear that upon termination of the claimant's employment, he was obligated to surrender the same. That

alternatively, the claimant is to reimburse the respondents the remaining car value as at the time of termination assuming the claimant had been making repayments for the purchase price over a repayment period of five (5) years.

66. In view of these competing positions, it is imperative to revisit the car loan agreement dated 14th January 2016 and ascertain its import. It provides as follows:-

> "Car Loan Agreement between
>
> Omya International AG, 4665 Oftringen, Switzerland and
>
> Mr Alvin Otieno, P.O. BOX 10038,30100 Eldoret, Kenya
>
> Concerning
>
> Car Purchasing Costs
>
> **Type of car**
>
> Chevrolet Trailblazer 2.8 cc
>
> The car will be used according to Omya Car Policy.
>
> **Apportionment of costs**
>
> Omya International AG will cover 100% of the purchase price of 5,000,000 KES (Kenyan Shillings)
>
> **Return of car/Repayment Commitment**
>
> Should Mr Otieno's Consultant agreement been(sic) terminated (by either party), he is obliges to return the car on the day the agreement ends. Alternatively, he shall reimburse Omya International AG upon leaving with the remaining value, assuming a straight-line armotisation over 5 years.
>
> We wish Mr Otieno all the best and every success in his new assignment…"

67. It is not in dispute that the motor vehicle is registered in the name of the claimant. It is also not in dispute that the 2nd respondent met the full cost for the purchase of the motor vehicle and has been making payments towards its maintenance, insurance and other related expenses.

68. It is the respondents' position that at the time the motor vehicle was purchased, the 2nd respondent had no legal status in the country hence could not register the same in its name and that the 1st respondent was yet to be registered and thus, it caused the motor vehicle to be registered in the name of the claimant. This position was not controverted by the claimant and was supported by the certificate of incorporation which confirms that the 1st respondent was incorporated on 5th April 2019.

69. Over and above, as captured in the car loan agreement reproduced above, the motor vehicle was to be used according to *Omya Car Policy*. Further, the claimant did not adduce any evidence of any expense he had made in respect of the motor vehicle and which had not been reimbursed to him. The copies of spreadsheet, invoices, payment vouchers and receipts for the maintenance of the motor vehicle was produced by the respondents and indeed prove that the claimant was reimbursed for all expenses incurred in respect of the motor vehicle.

70. Simply put, the only basis for the claimant's ownership is the registration status of the motor vehicle. In the face of the evidence on record as regards the purchase and maintenance of the motor vehicle, can the fact of registration alone confer the claimant ownership? I do not think so.

71. When all is said and done, in actual fact, the motor vehicle remained the property of the respondents for all intents and purposes. The claimant was merely the registered owner. Otherwise why would he be claiming refund of expenses for maintenance and insurance?

72. I am fortified by the determination by the Court of Appeal in **Jared Magwaro Bundi & another vs Primarosa Flowers Limited [2018] eKLR** where it was held as follows: -

> **"It was therefore held in *Muhambi Koja* (supra) that *Section 8* of the Traffic Act recognizes registration book or the Registrar's extract of the record as *prima facie evidence of title to a vehicle and the persons in whose name the vehicle is* registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a *de facto* owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.**
>
> **The position taken by this Court in *Joel Muga Opija* (supra) and *Muhambi Koja* (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the**

technical chains of form, the latter which does not ordinarily look at the justice of a case."

73. It is apparent that the claimant took possession of the motor vehicle on account of his engagement with the respondents and I am inclined to agree with the respondents that the same was to be used as a tool of trade. Once that relationship was severed, the claimant had no basis for further ownership save with the express consent of the respondents.

74. The agreement is very express and obligates the claimant to return the motor vehicle upon termination of the engagement. Indeed, having covered 100% of its purchase price and having paid maintenance and insurance costs for the entire period, it follows that only the respondents could exercise its discretion by either allowing the claimant to keep the motor vehicle or to retain the same subject to payment. Mr. Kirema in his testimony before court stated that the respondents were in need of the motor vehicle, hence the option exercised is obvious.

75. I must also address the issue of the sum of Kshs 666,667.00 proposed by the respondents' Frederic Bonne as being a consideration for the claimant retaining the motor vehicle. It is apparent that the statement was made in the course of an internal communication within the respondent companies and the claimant cannot base a legitimate expectation on the same as there was no offer extended to him on that basis. It is evident that Mr. Bonne was giving Mr. Kirema an option which he could choose to exercise or not. Clearly, he did not want to exercise that option hence the demand for the motor vehicle and subsequent Counterclaim.

76. In light of the foregoing, this court arrives at the conclusion that Motor Vehicle make: Chevrolet Trail blazer 2.8 cc bearing Registration Number KCH 056 B, is the property of the respondents.

Is the Counterclaim justified?

77. Having established that the Motor Vehicle make: Chevrolet Trail blazer 2.8 cc bearing Registration No KCH 056 B is the property of the respondents, the Counterclaim succeeds to that extent.

Is the Claimant is entitled to the reliefs sought

78. As the Court has established that the claimant's termination was procedurally flawed hence unlawful, he is awarded compensatory damages equivalent to four (4) months gross salary.

79. The claimant is also entitled to three (3) months salary in lieu of notice as per his contract of employment, but it is noteworthy that the same was subsumed in his terminal dues.

80. The claim for general damages is denied.

Orders

81. Against this background, I enter Judgment in favour of the claimant against the respondents as follows;

a. A declaration that the claimant's termination by the respondents was procedurally unfair.

b. Compensatory damages in the sum of Kshs 1,800,000.00 being equivalent to four (4) months gross salary.

c. The terminal dues in the sum of Kshs 3,338,324.18 as tabulated by the respondents to be paid to the claimant.

d. The total award is Kshs 5,138,324.18.

82. The respondents' Counterclaim also succeeds in the following terms: -

a. A declaration that Motor Vehicle make: Chevrolet Trail blazer 2.8 cc bearing the Registration No KCH 056 B is the property of the respondents.

b. The claimant is hereby ordered to surrender the said Motor Vehicle make: Chevrolet Trail blazer 2.8 cc bearing Registration No KCH 056 B to the respondents forthwith and not later than 7 days hereof.

83. Each party shall bear its owns costs given that the Claim has been allowed and the Counterclaim has succeeded.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022

……

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Maranga

For the Respondents Mr. Ayisi

Court Assistant Barille Sora

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 15th March 2020 and subsequent directions of 21st 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