



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 109 OF 2016**

**CHADWICK OMONDI OKUMU.....CLAIMANT**

**VERSUS**

**UCHUMI SUPERMARKETS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. It is not disputed that the claimant was employed by the respondent as its Finance Manager with effect from January, 2007. The claimant avers in his Memorandum of Claim that at the time of his employment, the respondent was under receivership. It would seem that all was well within the employment relationship for about 8 years or so, until 12<sup>th</sup> June, 2015 when together with the then Chief Executive Officer, Dr. Jonathan Ciano, he was directed to proceed for a one month leave to allow for a forensic audit of the respondent's accounts. This would mark the beginning of the end of his employment relationship with the respondent as his services were subsequently terminated on grounds of gross negligence and gross misconduct. Prior to that, he had tendered his letter of resignation on 12<sup>th</sup> June, 2015. It is the issuance of the letter of termination that triggered the instant suit through which he now seeks the sum of **Kshs 9,972,723/=** being one month's salary in lieu of notice, unpaid leave days and compensatory damages for unlawful termination.

2. The respondent opposed the claim vide a Response, which was filed on 4<sup>th</sup> April, 2016 and through which it denies that the claimant conducted his duties with due diligence and care to its satisfaction. It has cited the claimant for various acts of gross negligence and gross misconduct as well as breach of his employment contract. The respondent avers that as a result of the claimant's actions, it suffered trading losses which had resulted in its near collapse and erosion of its stock on the Nairobi Stock Exchange. It is also the respondent's averment that the claimant had indeed tendered a resignation dated 12<sup>th</sup> June, 2015 hence the termination was unnecessary. The respondent asked the Court to dismiss the claim with costs.

3. The matter proceeded for trial on 23<sup>rd</sup> September, 2021 when the claimant took the stand to testify in support of his case. Upon close of the claimant's case, the matter was adjourned for defense hearing which took place on 22<sup>nd</sup> November, 2021, and whereupon the trial closed.

**Claimant's case**

4. In his testimony before Court, the claimant stated that he served as the respondent's Finance Manager with effect from 17<sup>th</sup> January, 2007 until 15<sup>th</sup> June, 2017, when his employment was terminated. That he was initially employed on a contractual basis as the respondent was under receivership. That when the fortunes of the respondent improved, he was confirmed to serve on a permanent basis.

5. The claimant further testified that when he joined the respondent company, his main target was to turn it around. That at the time, the respondent had closed down most of its branches. It was the claimant's further testimony that during his tenure, the respondent grew steadily and its profitability went up as well as the number of staff. That indeed, his salary was also increased steadily from Kshs 250,000/= to Kshs 562,000/= following an evaluation of his performance.

6. The claimant further testified that on 10<sup>th</sup> June, 2015, the respondent held a Strategy and Business Development meeting as it had just concluded a Rights Issue. That the respondent's Directors wanted to understand how the proceeds from the Rights Issue had been utilized. That it was following the said meeting that he was directed to proceed on leave together with the respondent's then Chief Executive Officer (CEO), Dr. Jonathan Ciano. Elaborating on the Rights Issue, the claimant told Court that the same which had been approved by the respondent's Board was meant to inject more capital into the business thus spur its growth. He added that the process had commenced sometimes in 2012 and a series of meetings had been held by the Board to that effect. That the same was also part of a five (5) year plan strategy which was to guide the process of business growth. It was his further testimony that the Rights Issue yielded just below Kshs 1 billion hence there was a variance in the target amount and what was realized. He attributed this variance to various market factors for instance, demand and supply as well information in the market.

7. In further evidence, the claimant stated that upon being directed to proceed on leave, he handed over his tasks to a colleague. That on 15<sup>th</sup> June, 2015, slightly four (4) days into his leave, he received news of his termination through various news agencies including Safaricom's 411 SMS alert. That on the same date, the then respondent's acting CEO, Mr. Owino Ayodo met with him at Java Coffee House, Capital Centre and handed him a letter of termination. That in the letter of termination, he was cited for gross negligence and gross misconduct. That later on 2<sup>nd</sup> July, 2015, he was served with another letter of termination at the Stop Over car wash at Crowdaddy's restaurant along Mombasa road.

8. That subsequently, there was a lot of negative media attention that was injurious to his character. That he was subjected to an investigation by the Capital Markets Authority (CMA) and it is then that he came to learn of the existence of a forensic audit report. That the said forensic audit report was never served upon him. The claimant maintained that the respondent's books of accounts were always audited by the "big five" audit firms and there had never been any audit query regarding financial impropriety on his part.

9. It was his testimony that prior to his termination, he was not issued with a notice to show cause and neither was he subjected to a disciplinary hearing. That upon his termination, he was not paid any terminal dues by the respondent despite an assurance to that effect. He stated that the respondent's actions of terminating him had greatly affected him including ruining his job prospects. That the termination left a dark cloud hanging over his head. That he was never charged before a Court of law for misappropriation of funds.

10. In cross examination, the claimant denied that the respondent's then CEO, Dr Ciano had influenced his recruitment though he admitted that they had worked together previously, hence were acquaintances. He further stated that the Rights Issue involved many players and that the same was a business process. He further stated that at the time he left, the respondent was on an upward trajectory. He denied knowledge of the subsequent winding up of the respondent.

### **Respondent's case**

11. The respondent called oral evidence through its Human Resource Manager, Ms. Elizabeth Oyombe, who testified as RW1. She informed Court that she was employed when the claimant had already left the employment of the respondent.

12. She told Court that the claimant's termination was occasioned by issues relating to mismanagement. That there were challenges with suppliers who had not been paid and that the respondent was going through an economic down turn. RW1 added that there was a decline in the respondent's performance. She further averred that at the material time, the respondent had just concluded a Rights Issue and from the reports she obtained, the proceeds were not well utilized and that the respondent was on a downward trend by the time the claimant exited. RW1 further told Court that presently, the respondent was undergoing a voluntary arrangement under the Insolvency Act as its suppliers had petitioned the Court for orders of liquidation. She averred that the claimant was paid salary in lieu of notice as per his contract of employment. She termed the claimant's termination as fair.

13. In cross examination, RW1 admitted not seeing the evidence of the claimant's payment of terminal dues. She told Court that there had been no proper handing over report by the Advocates who were formally on record for the respondent. That as a result, the respondent had challenges accessing documentation relevant to the case. RW1 further stated that the general state of documentation at the respondent company was poor as job holders had been leaving employment without a proper handing over.

### **Submissions**

14. Both parties filed written submissions after close of the trial with the claimant submitting that his resignation was not accepted by the respondent as it issued him with a letter of termination on 15<sup>th</sup> June, 2015 and another one on 2<sup>nd</sup> July, 2015. The claimant further submitted that there was no evidence by the respondent to back up the allegations of gross negligence and gross misconduct on his part. That further, the respondent had not discharged its legal burden as required under sections 41, 43 and 45 of the Employment Act. To fortify its submissions, it cited the case of **Absalom Ajusa Magomere vs Kenya Nut Company Limited (2014) eKLR**.

15. On the other hand, the respondent denied that the claimant's termination was unlawful, wrongful and unfair within the meaning of the Employment Act. It submitted that there was a reason for the claimant's termination as the Rights Issue was under his care as the Finance Manager and that his termination was contractual. That further, the claimant's termination was for reasons it genuinely believed to exist at the time. It invited the Court to consider the determinations in the case of **Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd (2017) eKLR** and **Pius Machafu Isindu vs Lavington Security Guards Limited (2017) eKLR**.

### **Analysis and determination**

16. From the record before me, this Court is being called to resolve the following questions;

- a. Was the claimant's resignation valid?**
- b. If the answer to (a) is in the affirmative, was the claimant's subsequent termination of any effect?**
- c. If the answer to (b) is in the affirmative was the claimant's termination unfair and unlawful?**
- d. Is the claimant entitled to the reliefs sought?**

**Was the claimant's resignation valid?**

17. On record, is a letter of resignation dated 12<sup>th</sup> June, 2015 from the claimant. I will reproduce the same, thus;

“Chadwick O. Okumu

12<sup>th</sup> June, 2015

HUMAN RESOURCES MANAGER

UCHUMI SUPERMARKET LTD

P.O Box 73167-00200,

NAIROBI

Dear Sir,

**RESIGNATION FROM EMPLOYMENT**

I hereby give my resignation notice with effect from 12<sup>th</sup> June, 2015.

Thankyou for giving me an opportunity to work for Uchumi.

Yours faithfully,

Chadwirck Okumu.”

18. The respondent acknowledged receipt of the letter of resignation by affixing its stamp thereon.

19. There was no response from the respondent accepting the claimant’s letter of resignation. The pertinent question therefore is, in absence of an acceptance to the resignation, was the same effective and valid?

20. The Black’s Law Dictionary (10<sup>th</sup> Edition) defines the term resignation to mean: -

**“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one’s job or organisation, often in the form of a written statement.”**

21. Essentially, by penning down a letter of resignation and handing it over to the respondent formally, the claimant announced his intention to leave its employment with immediate effect.

22. In the case of **Edwin Beiti Kipchumba vs National Bank of Kenya Limited [2018] eKLR**, Rika J found that **“resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”**

23. I fully agree with the position espoused in the above decision and find that once the claimant had formally notified the respondent of his intention to leave its employment, it did not matter whether or not the resignation was accepted.

24. In the circumstances, I find and hold that the claimant’s resignation was valid.

25. Having found as much, was the subsequent termination by the respondent effective?

**Effect of the termination by the respondent**

26. The respondent issued the claimant with a letter of termination dated 15<sup>th</sup> June, 2015. The letter reads as follows;

“15<sup>th</sup> June, 2015

To Chadwick Okumu

Nairobi

Dear Chadwick

## **RE: TERMINATION OF CONTRACT**

The Board of directors of Uchumi Supermarkets Limited has terminated your contract with immediate effect. The Board terminates your contract due to the following:

- i. Gross misconduct; and
- ii. Gross negligence.

Yours faithfully,

Khadija Mire

Board Chair.”

27. Evidently, the letter of termination came three (3) days after the claimant had already tendered his letter of resignation. Thus, was the same effective?

28. On this issue, I wish to draw guidance from the case of **William Kariuki vs Kenya Civil Aviation Authority [2008] eKLR**, where the Court held that **“In this Court’s opinion, the plaintiff having resigned from the defendant’s employment and the defendant having accepted that resignation which fact was being acknowledged in the letter complained of, the relationship of employer/employee had been thereby severed.”**

29. Further, in the South African case of **Lottering vs Stellenbosch Municipality, (2010) 31 ILJ 2923 (LC)**, the Court held as follows: -

**“That the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract. This means that there was no longer a contract of employment once she resigned.”**

30. In yet another case, **Kennedy Obala Oaga vs Kenya Ports Authority [2018] eKLR**, the Court cited the South African case of **Mtati vs KPMG (Pty) Ltd (2017) BLL 315 (LC)** where it was found that where an employee tenders a resignation with immediate effect, there and then, the employer is deprived of jurisdiction to continue with the disciplinary process as resignation takes effect immediately. The Court went on to hold that **“Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority.”**

31. Following with the holding in the above determinations, which I wholly adopt, it is the Court’s finding that the claimant’s resignation took effect immediately and thus signifying the end of the employment relationship and subsequently, the respondent lost jurisdiction of over him. That included the right to terminate his employment.

32. As such, the claimant’s resignation being valid and having taken effect on 12<sup>th</sup> June, 2015, the employment relationship was severed and the contract of employment extinguished with immediate effect. Therefore, as at 15<sup>th</sup> June, 2015, when the respondent purportedly terminated the claimant’s employment, the employment relationship had long ceased to exist. The horse had bolted. What the respondent was doing was tantamount to flogging a dead horse.

33. It was immaterial for the claimant to terminate a non-existent contract of employment. As such, I find and hold that the purported termination by the respondent was inconsequential and of no effect hence is a nullity in law.

34. Having found the termination by the respondent to be null and void, it is not logical to determine whether the same was unlawful and unfair. As was held in the case of **Kennedy Obala Oaga vs Kenya Ports Authority (supra): -**

**“Summary dismissal was null and void, not based on an Employer-Employee relationship, and it makes no sense to inquire whether, or declare, such a decision is fair or unfair. The decision must be treated as if it was never made. It was null and void, without any legal consequences. To say it was unfair, would suggest that decision has legal consequences.**

35. Consequently, this Court cannot make a finding on a declaration of an act that has been declared a nullity in law.

### **Reliefs**

36. As there has been no finding on unlawful termination, the claim for compensatory damages cannot be sustained.

37. In regards to the claim for untaken leave days, the Court finds that when prorated, the claimant, is entitled to 15 leave days as clause 6 of his contract of employment did not allow for the carrying over of leave days to the subsequent year. Indeed, this tallies with the respondent’s computation of the claimant’s terminal dues.

38. The respondent in its defence admitted that as per its computation, the claimant is entitled to terminal dues in the sum of **Kshs 1,007,069/=**. It further stated that the same was not paid to the claimant due to issues of negligence that arose upon his resignation. I do not see any reason why the respondent would continue withholding the claimant’s terminal dues, when the issue of negligence was not subjected

to trial and proved. In the circumstances, the claimant is entitled to the said terminal dues.

**Orders**

39. In the final analysis, the Court arrives at the determination that the claimant resigned on 12<sup>th</sup> June, 2015 and his termination on 15<sup>th</sup> June, 2015 by the respondent was null and void.

40. The respondent is hereby directed to release to the claimant the sum of **Kshs 1,007,069/=** being his terminal dues.

41. The claimant shall be entitled to the costs of the suit, as it is the respondent's conduct of purporting to terminate him after he had tendered his resignation, that triggered the instant suit. The respondent should therefore bear the consequences arising therefrom.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant                      Mr. Wathome

For the Respondent                      Ms. Matata

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 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**