



**Ochenge v Nakumatt Holdings Ltd (Cause 380 of 2017)
[2022] KEELRC 4009 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4009 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 380 OF 2017
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN

ELIJAH OCHENGE CLAIMANT

AND

NAKUMATT HOLDINGS LTD RESPONDENT

JUDGMENT

1. Elijah Ochenge filed a Memorandum of Claim dated August 22, 2017 suing Nakumatt Holdings Limited for unlawful and unfair termination of his services. He avers that he was employed by the respondent on the November 20, 2009 as a shop assistant then promoted to be the driver of commercial heavy duty vehicle earning a gross salary of kshs 100,323/= per month. He worked for the respondent faithfully till January 24, 2017 when he was dismissed from employment.
2. Prior to the dismissal, the claimant avers that he received notice to show cause why disciplinary action should not be taken against him on allegation that there was fuel pilferage in motor vehicle registration number KAG 414 on the November 30, 2016 and on December 2, 2016 when he was the driver of the said vehicles. The claimant responded to the said notice denying the allegation of fuel pilferage.
3. The claimant was served with a notice to disciplinary hearing where he was heard but still dismissed. He avers that the respondent disregarded his explanation while dismissing him from employment.
4. The claimant through its union, Kenya Union of Commercial Foods and Allied Workers, appealed the respondent's decision vide the letter dated January 26, 2017 which did not elicit any response informing the need by the union to escalate the issue with the Ministry of Labour vide the letter of March 16, 2017, which never received a response either.
5. The claimant avers that the termination was unfair because the allegation of fuel pilferage was never established by the respondent and that his explanation was not considered by the respondent before his dismissal.



6. The claimant in the end prays for the following reliefs;-
 - a. A declaration that the termination of the claimant was contrary to the *Employment Act*, unlawful and unfair and therefore order for his reinstatement.
 - b. Leave accrues for 6 years worked.
 - c. Two-months salary in lieu of notice since the dismissal was unfair.
 - d. Travelling allowance during leave time for 6 years.
 - e. Compensation for unlawful dismissal equivalent to 12 months pat if no reinstatement is given.
 - f. Retirement benefits calculated thus; kshs $100,323/30 \times 20 \times 6 = 401,292$.
 - g. One way travelling allowance.
 - h. Any other relief this honourable court deem fit to grant.
7. The respondent entered appearance on September 18, 2017 through the firm of E M Juma and Ombui Company Advocates. Before filing a defence to claim, the said firm filed a chamber summons of April 16, 2019 seeking to cease acting for the respondent, which application was allowed on September 26, 2019. The respondent did not file any response to the claim and therefore the claim proceeded as undefended.

Hearing.

8. This cause was heard on the June 21, 2022, where the claimant testified as CW-1 and adopted his witness statement dated August 22, 2017 which reiterated the claim and produced the documents as his exhibits. He added that he never lost any fuel as alleged by the respondent. He avers that he went on journey to Kisii and back and if there was any loss of fuel, he would not have made it to Kisii and back. He also testified that upon termination he was not subjected to any disciplinary process.

Claimant's submissions.

9. The claimant submitted that he was unfairly terminated because his explanation on the alleged fuel loss was not considered by the respondent, neither was he granted an opportunity to be heard. Also that the respondent failed to controvert his case. The claimant supported his argument by citing the case of *Karurur Munyororo V Joseph Ndumia Murage and Another* Nyeri HCCC No 95 of 1988 where Makhandia J held that;-

“the plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in absence of the defendant's or their counsel to cross examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

10. Equally, the claimant argued that his case as submitted is credible and therefore the reliefs sought should be granted as prayed.
11. On the reliefs sought, the claimant submitted that it has proved his case to the required standard and prayed for payment of two-months salary in lieu of notice, 12 months compensation for the unfair termination, leave accrued for 6 years worked, retirement benefits together with costs of this suit.
12. I have examined the evidence and submissions of the claimant herein. I note that the claim as filed is against Nakumatt Holdings LTD which is currently under receivership.



13. Part VIII of the *Employment Act* 2007, provides for the procedure to be followed in seeking redress against an employer that has gone under receivership or bankruptcy. There are elaborate steps to be taken for the commencement of a suit against a company under receivership. The starting point for an applicant is to seek leave of the court envisaged under section 560 of the *Insolvency Act* to commence or continue with proceedings against a company under administration but only if such party shows exceptional circumstances. Section 560(1) of the *Insolvency Act* provides as follows;
- (a) “A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;
 - (b) A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the court; if the court gives approval—subject to such conditions as the court may impose;
 - (c) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the court; and
 - (d) A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the court.”
14. The factors to be considered by the court in granting leave was discussed in the case of *Owiti, Otieno and Ragot Advocates v Mumias Sugar Co Limited* (Under Administration) (2020) eKLR, the court held that;
- “When considering whether to grant approval under section 560, of the court may in particular take into consideration –
- (a) the statutory purpose of the administration;
 - (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;
 - (c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and
 - (d) the conduct of the parties.”
15. Also section 56(2) of the Kenya Deposits *Insurance Act* 2012 (KDIA) requires that leave of the court be sought before seeking to commence civil proceedings against an institution. It states;
- “No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the court.”
16. The wording of the above section is couched in mandatory terms. Under section 56(2) of the KDIA 2012, failure to seek leave of the court before commencing proceedings against a company under receivership means that the suit cannot be sustained as against that party.



17. In the case of *Andrew Gikuni Muchai v Chase Bank Ltd & Another* (*supra*), Nzioka J held;

“Section 43 of the *Kenya Deposit Insurance Act*, empowers the Central Bank of Kenya, wherever the circumstances require to appoint a Corporation to be the sole and exclusive receiver of any institution. Section 56 relates to stay of proceedings and states that; “No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”...The applicant counsel argued that these provisions relate to an institution in liquidation. The respondent submitted to the contrary. In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interest of its depositors, creditors and members of the public. In this case to preserve the bank’s liquidity, assets, and to find the best way to return it into normal business. The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a flood gate of actions, which may involve some of the matters placed under suspension. This is informed by the act that when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the bank’s business to be undertaken by all stakeholders of the bank; including limiting the bank’s services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a bank from *inter alia* receiving deposits and making payment, unless it is partially or fully lifted by Kenya Deposit Insurance Corporation. Thus, suits cannot be all commenced *suo moto* without court’s leave and/or sanction. That will create anarchy. I hold that, for a company under receivership, a party suing it must seek court’s leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the court. I therefore do not uphold the applicant’s submissions that, the provisions of section 56(2) of the *Kenya Deposit Insurance Act* negates institutions under receivership. As a consequent of the foresaid, I find that, the application herein is incompetent. The entire provisions of part IV of the Act, relates to receivership, liquidation and winding up.”

18. Also see the case of *George Mureithi and Others v Kenatco Taxis Limited* (In Receivership), this court held that;

“leave of court is mandatory as seen in the above provision couched in mandatory terms that no proceedings shall be commenced against the company unless leave of court has been sought and object to such terms as the court may impose.”

19. And in the case of *Amos Peter Omusotsi v Bulleys Tanneries* (Under Receivership), Mboghli J held;

“The 1st defendant is under receivership. No claim can be brought against the company under receivership without leave of court ...leave having not been sought and granted in this matter, the suit was incompetent *ab initio*..”

20. In *David Ndiritu Gathungu and Another v Chase Bank (Kenya) Limited (In Receivership) and 2 others* (2018) eKLR, where the court found a suit which had been filed without leave of the court against an



applicant under receivership, to be incurably defective and incompetent and it was struck out with costs. Also the case of *Charity Wangui Ngumo V Chase Bank Limited (in Receivership) & Antique Action Agencies* (2018) eKLR, where the court held that leave of the court was mandatory and found the suit therein to be incompetent *ab initio*.

21. In summary, there is no cause of action that can lie against a company under receivership without leave being obtained by the applicant.
22. The claimant having instituted his claim against Nakumatt Holdings LTD (In Receivership) and having proceeded without the leave of this court, the claim is definitely incompetent and cannot lie.
23. I therefore proceed and dismiss this claim accordingly.
24. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2022.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Fred

