



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 278 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**FRANCIS NJERU ZAKAYO** **CLAIMANT**

**VERSUS**

**CHEMSERVE CLEANING SERVICES LIMITED** **RESPONDENT**

**JUDGMENT**

The claim herein was commenced by the memorandum of claim dated 1<sup>st</sup> July 2020 which was amended on 5<sup>th</sup> October 2020. The memorandum of claim was filed together with a notice of motion under certificate of urgency in which the Claimant sought the following prayers –

1. Spent.
2. *The Court hereby grant leave waiving the discretionary requirement to pursue internal disciplinary proceedings under Section 9(4) of the Fair Administrative Action Act.*
3. *That pending the hearing and determination of the Application inter partes this Court be pleased to grant an interim injunction restraining the Respondent by itself, its agents and servants from otherwise from suspending the Applicant from employment, purporting to send him on compulsory leave, taking any other disciplinary action against him or terminating his employment.*
4. *That pending the hearing and determination of the Claim inter partes, this Court be pleased to grant an interim injunction restraining the Respondent by itself, its employees, its agents and servants from otherwise from suspending the Applicant from employment, purporting to send him on compulsory leave, taking any other disciplinary action or proceedings against him or terminating his employment.*
5. *That the Court grants the Claimant liberty to apply for such further or other orders and/or directions as this court would deems fit and just to grant.*
6. *That costs occasioned by this application be borne by the Respondent*

Upon hearing the application ex parte, the court made the following orders –

- a) Spent.
- b) *The Respondent is restrained from taking disciplinary action or terminating the employment of the Claimant pending hearing interpartes of this application.*
- c) *The Application is fixed for hearing inter-partes on 8<sup>th</sup> July 2020*
- d) *Applicant to serve Respondent forthwith and in any event not later than close of day on 3<sup>rd</sup> July, 2020.*

When the parties appeared for inter partes hearing on 8<sup>th</sup> July 2020, the Respondent was granted leave to file a reply to the application and

further directions given that parties file written submissions on the application before the hearing date on 22<sup>nd</sup> July 2020.

However on 15<sup>th</sup> July 2020 the Claimant filed another application seeking the following orders –

1. Spent.
2. That the Respondent's Board Directors be found to be in Contempt of Court orders issued on 2<sup>nd</sup> July 2020 by Onyango J. and be committed to civil jail and be detained in prison for a period of six (6) months or for such period this Court shall deem necessary for being in disobedience of the orders of this Court despite being aware of said Orders.
3. That the Respondent be compelled to pay a fine of Kshs.10 Million as a consequence for continued disobedience and/or non-observance of the orders of this Court given on the 2<sup>nd</sup> July 2020 and the said fine be paid to the Applicant.
4. That in addition to finding the Respondent's in contempt, that this Court be pleased to issue orders nullifying the purported termination letter dated 3<sup>rd</sup> July 2020.
5. That this court be pleased to issue orders maintaining the status quo before issuance of the purported termination letter and direct that the Applicant continue to receive his salary and all benefits pending hearing and determination of the Claim.
6. That this Court be pleased to issue orders directing this present Application be heard together with Application dated 1<sup>st</sup> July 2020 scheduled for hearing on 22<sup>nd</sup> July 2020.
7. That this court be pleased to grant any other or further orders of the court geared towards protecting the dignity and authority of the court.
8. That costs occasioned by this application be borne by the Respondent.

When the parties appeared in Court on 22<sup>nd</sup> July 2020 for the hearing of the two applications the parties recorded a consent compromising the applications. The consent dated 21<sup>st</sup> July 2021 is reproduced below –

**“By Consent,**

1. The Claimant's Applications dated 1<sup>st</sup> July 2020 and 15<sup>th</sup> July

2020 be and are hereby marked as settled on the following terms:

- a. That the Respondent withdraws the letter of termination dated 3<sup>rd</sup> July, 2020 issued to the Claimant.
- b. That the Respondent retains the Claimant on the payroll with full benefits pending completion of the following:
  - i. Negotiation of a separation agreement on a without prejudice basis for a period of 14 days from the date of this consent.
  - ii. Should parties fail to agree on a separation agreement in the said period the Respondent will reschedule the disciplinary proceedings not less than 7 days after the date of declaration of failed negotiations.

2. For purposes of any disciplinary proceedings relating to the Claimant, the Respondent shall not proceed unless the following conditions are met:

- a. The Respondent providing the Claimant with necessary documents that the Claimant requires to prepare his defence, in as far as the same are relevant for the hearing and are readily available. The request for these documents to be shared at least two (2) days prior to the date set for any disciplinary hearing;
- b. That the Claimant shall be at liberty to call a witness or witnesses at the hearing;
- c. That each party shall be permitted to have its legal counsel present in the disciplinary hearing;
- d. That Mr Charles Mumanyi and Mrs Patricia Ndungu are to be excluded from the disciplinary panel but may sit in the disciplinary hearing, if they so wish to clarify any matters that they may have handled.

3. Pending compliance with the aforesaid terms and confirmation of the outcome of any separation and/or disciplinary process by this Court, the Respondent shall not by itself, its agents and servants or otherwise howsoever suspend the Claimant from employment, or take any other disciplinary action against him or terminate his employment. Either party shall be at liberty to apply to court in the event that they are aggrieved by the process or outcome of the processes.

4. Each party shall bear its own costs in respect to the applications herein.

It is also on 21<sup>st</sup> July 2021 that the Claimant was granted leave to amend the memorandum of claim.

In the amended memorandum of claim, the Claimant seeks the following orders –

- i. An order for payment of the Claimants full salary withheld during the Claimants suspension period
- ii. An order for compensation as follows:
  - a) Unpaid allowance at Kshs.50,000.00 per month for month of March and April 2020
  - b) 12 months' pay for unfair termination at Kshs.3,600,000.00
  - c) Leave pay for 18 unpaid leave days from April 2019 – July 2012 Kshs.237,000.00
  - d) Unpaid fuel maintenance and fuel allowance for March-July 2020 at Kshs.250,000.00
  - e) Payment shortfall for April Salary at Kshs.28,000.00
  - f) Payment for commission earned Kshs.5,947,041.00.
  - g) Unremitted pension fund contribution Kshs.300,000.00
  - h) All other contractual dues
- iii. An order compelling the Respondent to pay a fine Kshs.5,000,000 as a consequence for continued disobedience and/or non-observance of the orders of the court given on the 21<sup>st</sup> September 2020 and the said fine be paid to the Claimant.
- iv. General Damages including aggravated and exemplary damages, for malice, unfair treatment and unprocedural termination.
- v. Cost of this suit.

The Respondent filed a Statement of Response to Amended Claim dated 18<sup>th</sup> November 2020 in which it admits employing the Claimant as a General Manager, and the termination of the Claimant's employment by letter dated 21<sup>st</sup> July 2020 following a disciplinary process that was agreed upon by consent of the parties. The Respondent denies the averments made by the Claimant against it in the amended memorandum of claim. It is the Respondent's case that the Claimant falsified accounts to create the impression that the Respondent was financially healthy when in fact it was on its knees. That this, and the Claimant's refusal to avail himself for performance appraisal upon completing one year in employment, together with other issues that came up during the Claimant's one year tenure at the Respondent's office, were the reasons for the disciplinary process commenced against the Claimant by way of notice to show cause dated 17<sup>th</sup> June 2020. That the notice to show cause invited the Claimant to a disciplinary hearing on 3<sup>rd</sup> July 2020 which the Claimant halted by orders obtained from this court on 2<sup>nd</sup> July 2020 but served upon the Respondent after the disciplinary hearing on 3<sup>rd</sup> July 2020, and resulted in the issuance of a letter of termination of the same date that was withdrawn by consent of the parties dated 21<sup>st</sup> July 2020.

The Claimant filed a reply to the statement of response dated 4<sup>th</sup> December 2020 in which he denies the averments made against him in the statement of response and reiterates his averments in the amended memorandum of claim.

The claim was by consent of the parties disposed of by way of pleadings, documents and written submissions which the Counsel for the parties highlighted in court.

#### **Issues for Determination**

I have considered the pleadings, the written and oral submissions and the authorities cited. The issues for determination are the following –

1. Whether the Respondent is in contempt of this court's orders.
2. Admissibility of transcript filed by Claimant on disciplinary hearing.
3. Whether there was valid reason for terminating the Claimant's employment.
4. Whether the correct procedure was followed in the termination of the Claimant's employment.
5. Whether the Claimant is entitled to the remedies sought.

## Contempt of Court

It is the Claimant's case that the Respondent disobeyed this Court's orders issued on 2<sup>nd</sup> July 2020. That he extracted and served the orders upon the Respondent on 3<sup>rd</sup> July 2020. The orders have been reproduced herein above. It is the Claimant's case that prior to service on 3<sup>rd</sup> July 2020, the Claimant himself informed the Respondent's Board of Directors of the issuance of the orders by email at 6.33 pm and served a digital copy on 3<sup>rd</sup> July 2020 at 4.56 pm. That the Respondent ignored the orders and purported to terminate the Claimant's employment vide letter dated 3<sup>rd</sup> July 2020 at 5.41 pm.

It is further the Claimant's position that in cognizance of the consent entered into by the parties, this Court issued orders on 21<sup>st</sup> September 2020 directing parties to amend and exchange their respective pleadings and restricted the Respondent from taking any other action against the Claimant other than filing pleadings. That in complete disregard of the court's directions, the Respondent again issued a termination letter to the Claimant on 23<sup>rd</sup> September 2020.

The Claimant relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where Court held as follows;

*"Subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala tides disobedience. This Court in the **Wambora case (supra)** affirmed the application of these requirements. The Court proceeded to find the Managing Director of the Respondent's company in contempt of the Court Order issued on 26<sup>th</sup> September 2013."*

The Claimant further relied on the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR** where the court held that;

*"The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.*

*A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.*

*The court directed the 1<sup>st</sup> Respondent to pay a fine of Kshs.5,000,000.00 while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were directed to pay a fine of Kshs.500,000.00."*

The Claimant prayed that in view of the contempt, the Respondent be compelled to pay a fine of Kshs.5,000,000/= for defying the court's orders of 21<sup>st</sup> September 2020.

In response the Respondent submits that the Claimant cannot revisit and revive the issues surrounding the orders of 2<sup>nd</sup> July 2020 and served on 3<sup>rd</sup> July 2020 as the consent dated 21<sup>st</sup> July 2020 compromised the application for contempt through the withdrawal of the letter of termination dated 3<sup>rd</sup> July 2020. That this issue is therefore moot and cannot be re-opened at this stage.

It is further the Respondent's submission that on 21<sup>st</sup> September 2021 the directions given by the Court were related to the filing of amended pleadings and concurrence of the parties to have the dispute determined by way of documents without the need for viva voce evidence. That there was no order restricting the Respondent from taking any other action other than filing pleadings, as alleged by the Claimant. That if any such orders had been issued, nothing would have stopped the Claimant from extracting the said orders and producing the same as evidence before this court, especially after the Respondent denied the same in its statement of response. That the issuance of the letter of dismissal was a natural consequence of the conclusion of the disciplinary process as dictated by the consent dated 21<sup>st</sup> July, 2020 which conclusion and arrival at a verdict was communicated to this Court on 21<sup>st</sup> September, 2020 after which the Respondent proceeded to dismiss the Claimant.

Contempt of Court is defined in **Black's Law Dictionary, Tenth Edition** as –

*"Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

Mativo J. in **Mengich t/a Mengich & Co Advocates & Another v Joseph Mabwai & 10 Others [2018] eKLR** states the elements of a Civil Contempt as espoused in a book titled "**Contempt in Modern New Zealand**" as follows:

- a) *The terms of the order were clear and unambiguous and were binding on the defendant.*
- b) *The defendant had knowledge of or proper notice of the terms of the order.*
- c) *The defendant has acted in breach of the terms of the order and*
- d) *The defendant's conduct was deliberate.”*

In the instant case, there are no extracted orders. In fact, the Respondent states there are no such orders meaning that there are unambiguous orders.

From the court record, what transpired is as set out below –

**“21.09.2020**

**Parties**

*Kanjama with Kanyara for Claimants*

*Kayugira for Respondent*

**Kanjama**

*This matter was before Wasilwa J. and referred us back to you. The parties entered a consent on 21<sup>st</sup> July 2020 to facilitate settlement on disciplinary proceedings. This process was concluded and Respondent intends to terminate the Claimant.*

*Consent was that proposed outcome was to be subject to approval by the Court. Our suggestion is that the Court handles the matter. We seek 7 days to file amended claim and Respondent 7 days to respond.*

*We request that the Court allows the matter to proceed by way of documentary evidence pursuant to Rule 21, highlight and take a judgment date.*

**Kayugira**

*We have no objection. The only thing I would like to mention is that a decision was made to dismiss the Claimant. We were to report to court then issue letter of dismissal. We can do that today then proceed as proposed by Mr. Kanjama. The Claimant is not working.*

**Kanjama**

*The Court gave an injunction. We eventually compromised the application in a consent. We have no objection to a letter of termination being issued, subject to proceedings in this matter. The Claimant was last at the Respondent's premises on 10<sup>th</sup> September 2020.*

**Kayugira**

*Mr. Kanjama's client moved to court due to disciplinary process. Now that he has been terminated the requirement that the Claimant remains in payroll would be prejudicial to the Respondent.*

**Court**

*It is not for Court to confirm the outcome of disciplinary process.*

*There is no application before the court.*

**Court**

*Claimant granted leave to amend claim within 7 days. Respondent to file response within 7 days of serve. Parties therefore to exchange submissions and highlighting on 27<sup>th</sup> October 2020. Parties will proceed by way of documents and submissions.*

**SIGNED”**

From the foregoing it is clear that there were no orders of the court with respect to the disciplinary proceedings or the consent by the parties.

I would agree with Counsel for the respondent that there are no orders capable of being disobeyed made on 21<sup>st</sup> September 2020. Further, that the application for contempt was compromised by the parties by the consent of even date.

Thirdly, no notice was given to the Respondent of the intention to cite it for contempt. Further, the Respondent being a corporate body, acts through its officers as it cannot act on its own. No officer has been named nor the actions constituting the contempt brought to the attention of such officer with notice to answer to such charges.

As was stated in the case of **Mengich t/a Mengich & Company Advocates supra** contempt is a quasi-criminal charge and must be proved to a standard which is just below the threshold in criminal cases. I find no proof of contempt in the instant matter.

### **Admissibility of Disciplinary Hearing Transcript**

It is the Respondent's position that the transcript of the disciplinary hearing filed by the Claimant at pages 514 to 942 of the Claimant's bundle of documents filed with the amended claim is not admissible.

The Claimant filed what he termed in his supporting Affidavit as *"a transcription of the disciplinary hearing as recorded by the Claimant"* in the referenced pages of his list and bundle of documents. The Claimant or his counsel did not inform the Disciplinary Panel that he was recording the proceedings at any point in time during the two disciplinary sessions. The Respondent is, therefore, a stranger to the fact of the recording, in the first place. Had the Claimant required a transcription of the proceedings, nothing would have been easier than to request for the services of an independent transcriber for this purpose.

Further, the filed transcription is not accompanied by any certificate explaining the device used to record the proceedings, the manner and by whom the transcription was made and no attempt whatsoever was made to authenticate and confirm the accuracy of the said transcription.

Section 106B of the Evidence Act defines a document to include electronic records. The section further stipulates the conditions for the admissibility of electronic records Part VII of the Evidence Act set two special rules on computer evidence notably the authentication and data integrity. Authentication entails the following inter alia:

- (i) *"That the contents of the record have remained unchanged;*
- (ii) *That the information in the record does in fact originate from its purported source, whether human or machine*
- (iii) *That extraneous information such as the apparent date of record is accurate."*

The Court of Appeal in **Achieng v R** held as follows in respect of a tape recording and transcript sought to be produced in evidence:

*"The time, place and the accuracy of the recording must be proved by a competent witness and the voice must be properly identified. The party relying on the tape recording must prove by competent witness, the time, place and the accuracy of the said tape recordings. The court must be satisfied beyond reasonable doubt that the record of tape record evidence is not tampered with."*

For the Claimant it is submitted that under Section 20 of the Employment and Labour Relations Court Act the Court has general powers in proceedings to inform itself on any matters as it considers just. That the court is also allowed to act without undue regard to technicalities as is also envisaged under Rule 25 of the Employment and Labour Relations Court (Procedure) Rules which provides for hearing procedure in the Court.

It is further submitted for the Claimant that it has always been the practice of this Court and its predecessor, the Industrial Court not to be bound by rules of evidence under the Evidence Act. That parties are allowed to proceed even by affidavits which are admissible under the Civil Procedure Act. That emails attached to documents before the Court would also be subject to challenge under Section 107 of the Evidence Act if strictly applied. Further that under the Evidence Act there are no rules on the format of certificates and affidavits would suffice as certificates.

It is further the submission of the Claimant that there is no objection to any specific content of the transcript or an alternative version preferred by the Respondent on what transpired to the meeting. Counsel relied on the ruling in **Cause No 1263 of 2012 between James Mangeli Musoo v Ezeetec Limited [2014] eKLR** where *Marete J. stated –*

*"The circumstances of this case are an application for amendment of claim. The normal practice would be the party seeking to do this to seek leave to file a formal application in the circumstances. He does not and, seeks to do this vide an oral application. The issue before court is whether the normal practice of amendment of pleadings – a formal application, amounts to a technicality or otherwise. It is to me, not a technicality but an appropriate rule of procedure and therefore must be observed. Even if this was otherwise, the Constitution of Kenya, 2010 and the Industrial Court Act, 2011 only restrict undue regard to technicalities and not regard to technicalities as such. The Constitution and statute has no quarrel with due regard or even any regard to technicalities. It would therefore mean that even if this was a technicality, the test would be whether this is duly or unduly applied or regarded."*

Counsel submitted that the Claimant is prepared to produce the audio recording or file an affidavit.

The impugned transcript was filed with the amended claim dated 8<sup>th</sup> October 2020. The Respondent filed its reply on 18<sup>th</sup> November

2020.

Rule 14(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that –

**(5) A party may, by notice, object to a pleading stating grounds of objection except that no objection may be raised to any pleading on the ground of any want of form.**

Further, Rule 15(1) provides for pre-trial procedure as follows –

**15. Pre-trial procedure**

**(1) The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain:**

- (a) points of agreement and disagreement;**
- (b) the possibility of alternative dispute resolution or any other form of settlement;**
- (c) whether evidence is to be oral or by affidavit;**
- (d) whether legal argument shall be written or oral, or both;**
- (e) the estimated length of the hearing; and**
- (f) any other matters the Court may deem necessary.**

The Respondent ought to have raised the objection to the transcript either as provided under Rule 14(5) or during pre-trial directions. I think it is too late to object to pleadings on record at submissions stage when like in this case, it is too late for the Claimant to remedy the situation.

Further, the Respondent has filed its own minutes of the disciplinary proceedings. It has not stated any prejudice it will suffer because of the transcript filed by the Claimant. It has further not pointed out any specific portion of the transcript that are in its opinion not a factual representation of what transpired during the disciplinary hearings.

I further find that this is a technicality that does not affect the substance of the suit. I will say no more on the transcript.

**Whether there was valid reason for termination of Claimant's employment**

The reasons for termination of the Claimant's employment as stated in the letter of dismissal are the following –

**1. Gross Misconduct/Insubordination**

- a. Failing/refusing to withdraw the confidential client contracts and cancel the facility with the Bank of Africa as requested by CCSL's Board of Directors in February 2020;*
- b. Failing to prepare a report for the Board meeting held on 6\* May, 2020 as requested by Madam Patricia Ndungu, a Member of the Board and instead preparing a summary report (plagiarized from die Finance consultant's report) that you presented at die meeting*
- c. Failing/delaying to extend the Customer Relation Managers' probation despite the issuance of instructions by the Board to do so. The extension was due on 5\* November, 2019 but the only letter produced (instead of three letters as expected) was issued on 29th November, 2020 long after the contract had by law been confirmed. This exposed die company to potential law suits had the CRMs challenged the late extension.*
- d. Failing/delaying to terminate the Madison Pension Scheme despite being requested to do so. From your response the Panel was of the opinion that the length of time it took to communicate to staff was unacceptable and continued to expose CCSL financially and legally despite several reminders;*

**2. Fundamental breach of the terms of contract of employment matters showing a lack of integrity.**

*As the overall administrative head responsible for oversight duties and as the custodian of company resources such as administration, finance, human resource etc, you fundamentally breached the terms of your contract of service and demonstrated a lack of integrity in the performance of your duties by:*

- a. Issuing two cheques to Daveson's Ltd on the same Local Purchase Order number and failing to report or cause a report to be filed on the lost cheque. Your explanation that you failed to report to save CCSL bank charges was found not plausible because the bank charges would be negligible compared to the risk of losing Kshs. 103,500/- if the cheque was banked and had it not been for the Finance Consultants interception, the Company would have likely lost the money.*

*b. Allowing a junior officer to include two (2 no.) ineligible dependents in the company's medical insurance scheme*

*c. Irregular inclusion of your own ineligible dependents in the company's medical insurance scheme who included your adult daughter and grandchild.*

*As the GM of the company, it was your responsibility to ensure the company insured only eligible dependents. Having failed to do so, the disciplinary panel found that your allegation that there was no money lost was quite contradictory to your allegation that you wrote to CIC to demand a refund of money spent by Caroline Buyaki long after she left CCSL employment.*

*The Panel, to the contrary, found that indeed CCSL lost money through high premiums; insuring ineligible dependents. There were also losses in the cost of the loan taken to insure an inflated premium.*

*The panel found that you acted dishonestly to irregularly benefit your ineligible dependents and that when you were put to task to explain this conduct, you lied to the panel that you cancelled the irregular insurance covers and destroyed the cards in October 2019 when in fact the cancellation was done in March 2020 after discovery of the irregularity by the Board.*

*d. The Board also found that you presented inaccurate/false management accounts report with intent to mislead the BOD regarding the FY 2019/20 profitability.*

At the disciplinary hearing the Claimant admitted to delaying to extend probation period for the Customer Relations Manager. He also admitted to failing to withdraw the confidential client contracts and to cancel the facility with the Bank of Africa as directed by the Respondent's Board Directors.

The Claimant further admitted to issuing two cheques to Davison's Limited and to allowing his ineligible dependants and two ineligible dependants of an officer of the Respondent working under him to be included in the Respondent's medical insurance scheme.

From the admissions, I find that the Respondent had valid grounds to take disciplinary action against the Claimant and that the admissions constituted valid reasons for termination of the employment of the Claimant.

#### **Whether the Respondent complied with fair procedure**

The original letter of termination of the Claimant's employment was withdrawn by the Respondent. The Claimant's Counsel was present at the disciplinary hearing of 1<sup>st</sup> and 10<sup>th</sup> September 2020.

The Claimant submitted that the disciplinary panel was improperly constituted, that the disciplinary process was improperly combined with the Claimant's performance review, that the Claimant was subjected to bias, denial of access to Claimant's emails, ambushing the Claimant among other grounds as more particularly set out in the paragraphs 39K, 39L and 39K (sic) of the amended claim.

The composition of a disciplinary panel in an employment disciplinary set up is always by persons who work with the employee. The Employment Act does not envisage an employer going to look for panellists for the disciplinary committee from outside the company. In the instant case the Claimant was a General Manager employed by the Board, which is the highest organ in the company.

Unless there are terms and conditions of service setting out the composition of an independent disciplinary committee, the law does not require the employer to get persons who are independent from the entity to sit in disciplinary panels. What is provided for in Section 41 of the Employment Act is that the employee is informed of the reasons for which the employer is contemplating termination and is allowed to respond to those grounds.

That the employee is further given an opportunity to respond to the charges against him in the presence of a union official if he is a member of a union, or a fellow employee. Further that the employer considers the representations by the employee and of the person accompanying him, before making a decision whether or not to terminate the employment of the employee.

In this case, the Claimant was heard on 1<sup>st</sup> and 10<sup>th</sup> September 2020, in the presence of his Counsel who was also allowed to make representations and ensure that the procedure at the meeting was fair.

I am satisfied from the evidence on record that fair procedure was complied with in accordance with the provisions of Section 41 of the Employment Act.

#### **Whether the Claimant is entitled to the reliefs sought.**

Having found both valid reasons and fair procedure was complied with by the Respondent, the Claimant is not entitled to general damages as he has not proved any reason for grant thereof. He is also not entitled to compensation for unfair termination of employment as the same has not been proved.

The Claimant is however entitled to any salary withheld during suspension on the basis that the first termination which was withdrawn was irregular. He is also entitled to any allowances payable up to the date of dismissal. He is also entitled to any leave pay if he has leave days earned but not taken. He is also entitled to shortfall on salary for April 2020 if it has not been paid.

The claims for car allowance for March and April 2020 are also payable as the Claimant's letter of appointment provides for the same.

The claim for pension contributions should be addressed to the pensions scheme managers and for Retirement Benefits Authority who are by law mandated to handle the same.

Fuel and car maintenance allowance up to July 2020 are awarded to the Claimant.

The prayer for Commission was not proved and is rejected.

**In conclusion, judgment is entered for the Claimant against the Respondent in the total sum of Kshs.565,000/-. The Respondent shall pay Claimant's costs based on the decretal sum. Interest shall accrue from date of judgment.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF MAY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**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 has 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.

**MAUREEN ONYANGO**

**JUDGE**