



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

**AT NAIROBI**

**CAUSE NUMBER 1960 OF 2015**

**BETWEEN**

**KELLEN MURIUNGI.....CLAIMANT**

**VERSUS**

**ALLIANCE CAPITAL PARTNERS LIMITED.....RESPONDENT**

***Rika J***

***Court Assistant: Emmanuel Kiprono.***

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***Avedi & Company, Advocates for the Claimant.***

***Namachanja & Mbugua, Advocates for the Respondent.***

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**JUDGMENT**

1. The Claimant filed her Statement of Claim on 4<sup>th</sup> November 2015. She claims she was employed by the Respondent Company and seconded to a subsidiary of the Respondent, Mvuli Management Limited as its Chief Executive Officer [CEO].
2. The letter of employment indicates commencement date was on 1<sup>st</sup> October 2012.
3. The Claim revolves around a share options clause, in her letter of employment. It is worded as follows:  
  

*‘The CEO shall receive options to purchase up to 25,000 new ordinary share in MML [the subsidiary] [the ‘Option Shares’] at a price of Kshs. 225 per price [?]. The Option Shares vest evenly over a period of 5 years commencing 1<sup>st</sup> October 2012, and the CEO may utilize a minimum of Kshs. 70,000 per month, from her pay to acquire the shares...’*
4. There was deduction made therefore from the Claimant’s salary, for the sum of Kshs.70,000 monthly, for a period of 20 months the Claimant was in employment, amounting to Kshs. 1,400,000.
5. She avers that the Respondent undertook to pay her this sum in 3 equal instalments, on 1<sup>st</sup> January, 1<sup>st</sup> February, and 1<sup>st</sup> March 2014. The Respondent failed to do so, necessitating the filing of this Claim.
6. The Claimant avers, that the Respondent did not allocate to her shares equivalent of her contribution and no share certificates issued by the time she left employment. She prays for Judgment against the Respondent for the sum of Kshs. 1,400,000, costs and interest.
7. The Respondent filed its Statement of Response on 14<sup>th</sup> December 2015. It concedes that the Claimant was employed by the Respondent as set out in the Statement of Claim. There was no agreement for refund of Kshs. 1,400,000 to the Claimant. The Respondent agreed to pay the Claimant the value of her shares under the Employee Share Option Purchase Scheme [ESOP] subject to sale of her shares, and resource injection into the Respondent by way of successful rights issue, scheduled for April 2014. The issue was unsuccessful and the Claimant’s

shares have not been sold. The Respondent cannot therefore pay the Claimant the sum of Kshs. 1,400,000.

8. On 9<sup>th</sup> July 2021, the Parties agreed that there is a singular issue in dispute, which could reasonably be dealt with under Rule 21 of the E&LRC [Procedure] Rules 2016. They confirmed filing and exchange of their Submissions at the last mention in Court on 23<sup>rd</sup> September 2021. Judgment was reserved for the month of November 2021, but is ready for delivery on the date indicated at the end of the Judgment.

9. The Submissions are essentially a restatement of the Parties' respective positions contained in the Pleadings, as summarized above.

**The Court Finds:** -

10. After the Claimant left employment, the Respondent gave her timelines, when her terminal benefits would be paid. The benefits included at number 2 of the computation, ESOP payments for 20 months, amounting to Kshs. 1,400,000. Payment was to be paid from proceeds of sale of Respondent's untaken rights. The estimated period of payment was between January and March 2015. This was the payment proposal given by the Respondent.

11. There was no payment made by March 2015, compelling the Claimant to file this Claim in November 2015.

12. The Respondent explains its failure to pay: it was not able to hold a successful rights issue as scheduled in April 2014.

13. The Court does not think that such failure, warrants continued withholding of deductions made from the Claimant's salary over a period of 20 months, amounting to Kshs.1,400,000.

14. There is no evidence that any shares vested in the Claimant. There was no specific number of shares advised by the Respondent, as having vested to the Claimant. There was no time during the 20 months, when it is shown that the Claimant could exercise any option due to a shareholder. She was not availed any Share Certificate at the time the Respondent purported to sell her shares which, 'vested evenly over a period of 5 years.' If the Respondent was unsuccessful in its rights issue exercise, is it justified to retain the Claimant's money, long after the Claimant left employment?

15. Long after the Claim was filed, the Respondent wrote to the Claimant on 20<sup>th</sup> May 2016, purporting to forward to the Claimant Share Certificate No. 32 for 875 ordinary shares in the Respondent. The Claimant had long left employment and filed the Claim. The Respondent had already made an undertaking to refund the Claimant the sum of Kshs.1,400,000 deducted from her salary. There was no agreement, that if the Respondent failed in its rights issue of April 2014, it would continue withholding the Claimant's dues. There was no evidence presented by the Respondent, of any shares vesting in her, during employment. The Share Certificate was availed by the Respondent and declined by the Claimant, when the matter was actively in Court. All other terminal benefits offered to the Claimant seem to have been paid. The Respondent continues to withhold her salary, maintaining that the Claimant purchased shares. Those purported shares are completely useless to the Claimant, and not even the Respondent has been able to dispose of them in the market. The position taken by the Respondent is unconscionable and reeks of unfair labour practice.

16. The Respondent availed to the Court extracts from the Black's Law Dictionary 9<sup>th</sup> Edition, where the term 'vest' is defined as "having become a completed, consummated right for the present or future enjoyment; not contingent; unconditional; absolute. "

17. The shares offered to the Claimant did not become complete or consummated as described above. She had no control over the shares allegedly sold to her. She could not sell and transfer any shares, without a Share Certificate. As discussed above, the Respondent offered her Share Certificate when the matter was already in Court and after the Claimant left employment. The Respondent did not act in the interest of vesting any shares in the Claimant, but acted in an attempt to create evidence before the Court that shares had vested, and justify the position that the Claimant could not therefore recover her money. Why would the Respondent issue a Share Certificate to the Claimant, back-dated 16<sup>th</sup> December 2015, on 26<sup>th</sup> May 2016 when the Claim was already in Court?

18. The Respondent needed to show the Court, in the absence of valid Share Certificate, other evidence of a vesting schedule. It needed to show when the shares vested in the Claimant, and show the number of those shares.

19. The Respondent relies on the decision of the Court in **Industrial Court Cause No. 628 of 2012 between Peter Gachengo Kimuhu v. KenolKobil Limited [2014] e-KLR**, where it was held that, "the vested units became an absolute, complete and consummated benefit fully owned by the Claimant on their vesting date." The Respondent in this decision, had argued that the Claimant became dis-entitled to the units assigned to him by the Respondent, upon dismissal. It is submitted, that the Court held that an Employer cannot reclaim from an Employee an accrued benefit.

20. The Court thinks, the decision above is distinguishable from the current dispute. There was a Trust Deed in the case of **Peter Gachengo Kimuhu**, which regulated ESOP. It stated that upon dismissal, an Employee's units became invalid even if they had vested. It allowed the Employer to clawback units vested in a dismissed Employee. The Deed provided that the units would vest in the Employee 3 years after grant. The Court was prayed, and granted that the Claimant is issued Share Certificate for 9,555 shares, which had vested in him, by the time he left employment. The units were allotted to Employees as an incentive to own part of the business. The cost of the shares was carried as a salary expense by the Respondent. When Employees sold their shares, the Trust would pay out to the Employees full proceeds of the sale, based on redemption price.

21. The Claimant in the present dispute, unlike Claimant Kimuhu, was to pay a portion of her salary in the long term, for unspecified number of shares. The intended share sale to the Employee was not elaborated in a clear workplace instrument. The Respondent did not vest shares in the Claimant after a specific period. There was no vesting schedule. There was no evidence of vesting. The Respondent does not seek to enforce a clawback clause, but seeks to avoid repayment of deductions made against the Claimant's salary, on the unfulfilled promise that

she could own a part of the business through shareholding. She could sell nothing without a Share Certificate. Unlike the Claimant in the decision above, she does not seek the Court to find that any shares vested in her. She holds a view to the contrary; that the offer by the Respondent was not consummated. The offer by the Respondent never crystallized, and was not backed by any Human Resource Manual or Trust Deed. In the end there were no shares vested in the Claimant.

22. Without the offered shares having vested in the Claimant, the amount of Kshs. 1,400,000 remains wrongfully withheld or deducted, and is repayable to the Claimant under Section 18[5] [a] of the Employment Act, 2007.

23. The Court is persuaded that the Claim has merit. It is allowed with costs and interest, from the date the Respondent offered to complete payment of Kshs. 1,400,000 - end of March 2015.

***IT IS ORDERED: -***

***a. The Respondent shall pay to the Claimant her withheld salary deductions amounting to Kshs. 1,400,000.***

***b. Costs to the Claimant.***

***c. Interest allowed at court rates, from 1<sup>st</sup> April 2015, till payment is made in full.***

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 22<sup>ND</sup> DAY OF OCTOBER 2021.**

**James Rika**

**Judge**