



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2046 OF 2016**

**GIDEON WANGANG'A MAINA.....CLAIMANT**

**-VERSUS-**

**ACORN GROUP LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 13<sup>th</sup> March, 2020)

**JUDGMENT**

The claimant filed the statement of claim on 05.10.2016 through Kiragu Wathuta & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the dismissal of the claimant by the respondent was wrongful, unfair and unlawful.
- b. Compensation for wrongful, unfair and unlawful dismissal being 12 months' salary.
- c. The respondent to issue the claimant with a certificate of service.
- e. Three months' salary in lieu of notice.
- e. General and exemplary damages.
- f. Interest on the sum claimed above from the date of filing the cause in court.
- g. Costs of the cause.

The claimant has pleaded as follows. He was employed by the respondent by the letter dated 07.10.2015 and effective 16.11.2015 to the position of Chief Finance Officer. The terms and conditions of service were in the employment contract which the parties signed. The Kenya employment law applied. The respondent's rules and regulations also applied and as per the Human Resource Policy Handbook. The claimant served diligently with honesty and professionalism so that he had a clean record of service. On 25.08.2016 the claimant was summoned to a meeting by his superiors who pressurised him to resign on the promise that he would receive a favourable recommendation letter from the respondent. The claimant declined to resign as suggested as he had no intention to resign. Thereafter the respondent implemented a malicious and unlawful scheme to dismiss the claimant from employment. On 26.08.2016 the claimant was given a dismissal letter dated 25.08.2016. The dismissal was on account of alleged gross misconduct. The claimant was not paid the 3 months' salary in lieu of termination as stipulated in the contract of service. The reason for dismissal was not genuine and the claimant was not heard prior to the dismissal. As at termination the claimant was paid a consolidated salary of Kshs.1, 000, 000.00 per month plus other benefits Demand notice was served but the respondent has failed, refused or neglected to make good the claimant's claims. The claimant has therefore filed the suit.

The respondent filed the memorandum of response on 18.11.2016 through Majanja Luseno & Company Advocates. The respondent admitted that it employed the claimant to the position of Chief Finance Office as pleaded for the claimant. The respondent's job description was agreed upon. The respondent further pleaded as follows. The claimant's role covered a commercial development on land No. L.R 3734/619 Original No. 3734/3/176 known as Tiara House. The claimant knew that Tiara House was developed by a facility offered by HFC Limited; Tiara House was charged to HFC Limited; the facility in favour of HFC Limited was to be managed and monitored prudently, professionally and with total dedication so as not to be in any arrears; and Tiara House was a joint venture project with Crown Paints and Building Products Limited with disclosed further securities in form of corporate guarantees and individual guarantees having been sought and provided from some of the directors of the respondent. Further in disregard of his contractual obligations or gross misconduct or negligence on the part of the claimant, Tiara House Loan Account with HFC Limited fell into arrears and as a consequence the entire loan of Kshs. 583, 653, 312.27 was called vide a demand letter dated 05.07.2016. The particulars of negligent discharge of duty included failing to diligently monitor the loan facility advanced to Tiara Properties Limited; Causing the loan facility advanced to Tiara Properties Limited to go into arrears from 11.07.2016 to date; exposing the respondent to potential claims by its customers for breach of contract; failing to obey the

respondent's instructions when dealing with customers; and negligently and exhibiting conduct prejudicial to the business of the respondent with its customers and more particularly its partners. The respondent denied that the dismissal had been unfair and unlawful and that the dismissal letter of 25.08.2016 had issued within the terms of the contract of service. Further the claimant was formerly asked to show-cause why the loan facility was in arrears but failed to reply. The show cause notice was by the email dated 18.08.2016. The demand letter was served but the respondent took the view that the dismissal had not been unfair or unlawful. The respondent prayed that the claimant's claims against the respondent be dismissed with costs.

The Court has considered the pleadings, the evidence and the submissions filed for the parties.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the parties are not in dispute that they were in a contract of service per the letter of employment agreement dated 07.10.2015. The claimant was employed as Chief Finance Officer and the job description was given to him in writing as exhibited. The agreed salary was Kshs.1,000,000.00 per month inclusive of house allowance. It was effective 16.11.2015 for an indefinite period on permanent basis. Probationary period was 3 months to be served successfully prior to confirmation. Probationary term could be extended for 3 months. The contract could be terminated without notice or payment in lieu of notice on account of breach of the agreement or respondent's policies and regulations and failing to remedy the same in 5 days from the date of a written notice from the respondent requiring the claimant to remedy the breach; or if the claimant is guilty of gross misconduct as provided under the Employment Act, 2007 which entitle the respondent to summarily dismiss the claimant. The contract would also be terminated by either party giving to the other 3 months' written notice or payment in lieu thereof without the necessity of giving reasons therefor.

To answer the **2<sup>nd</sup> issue** for determination the contract of service between the parties was terminated by the letter dated 25.08.2016. The letter stated as follows:

**“Dear Gideon,**

**RE: SUMMARY DISMISSAL**

**We refer to your Employment Agreement dated 7<sup>th</sup> October 2015.**

**As the Chief Finance Officer of the Company and as stipulated in your Job Description, it is your responsibility to ensure the Group retains a strong liquidity position at all times to meet its obligations as they fall due.**

**We note with regret that you allowed the Loan Facility advanced to Tiara Limited, (one of the Company's affiliates) by Housing Finance to go into arrears from 11<sup>th</sup> July 2016 to date, without taking any action to remedy the situation or informing your immediate supervisor so that the company could make arrangements to remedy the situation. Furthermore, the Chief Operating Officer wrote an email to you on 18<sup>th</sup> August (attached), asking you to explain the circumstances that led the loan falling into arrears, but to date you have neither responded to the email nor taken any action on the matter despite the serious potential consequences.**

**From the foregoing, it is clear that you have wilfully neglected to perform your work which it was your duty to perform and have been careless in performing a responsibility, which by its nature, was your duty, under your contract, to have performed carefully and properly. Even after the matter was brought to your attention you have to date neither engaged your immediate supervisor on the matter nor taken any steps to address the situation. As a result of the above, you have exposed the company and one of its affiliates to huge reputational and financial losses.**

**It is for this reason that the Company has decided to dismiss you summarily for gross misconduct in accordance with clause 44 of the Employment Act and clause 28 of your Employment Agreement.**

**Notwithstanding the above and on compassionate basis, and without prejudice to the Company's rights and at its sole discretion, the Company in accordance with the provisions of Clause 44 of the Employment Act will give you one month's notice and pay your salary for the said month subject to satisfactory hand over.**

**Please note that the decision is final and the Company will not be entering into further correspondence with you on this matter.**

**Yours faithfully,**

**Signed**

**EDWARD KIRATHE**

**CHIEF EXECUTIVE OFFICER**

**For and on behalf of ACORN GROUP LIMITED”**

The **3<sup>rd</sup> issue** for determination is whether the termination is unfair. The Court has considered the evidence on record. First the claimant does not deny that he received the email of 18.08.2016 which stated, **“The attached statement indicates the HF loan has been in arrears since 11<sup>th</sup> July? This does not only complicate the sale of shares to Crown but can make BBK rethink their offer as the facility will now be deemed to be non-performing. How did this happen?”** The email was addressed to the claimant by one Peter Njenga, the respondent's

alternate director and the respondent's witness (RW). In relation to the email the claimant testified thus, "**In email of 18.08.2016 at 1214 pm am asked to explain how loan account fell in the arrears. Explanation was asked for. I have not replied the email. I say I had no time to reply. When I received email I was out of town. Monday 22.08.2016 I resumed at office. On 22.08.2016 no email filed to reply. I cannot confirm I replied Peter Njenga's email of 18.08.2016. I was not accorded due process. I did not reply the email of 18.08.2016. I say email was a show-cause letter. I replied to Njenga in a meeting. I received the email of 18.08.2016 at 1214 hours. I have no evidence I ever replied orally or in writing. I say we met and discussed on a day I don't recall. There were many things to handle after my leave. Email was sent to my office email. I could not access my laptop. It was attached on termination letter. Between 18.08.2016 and 26.08.2016 are 8 days (a week).**" The claimant further testified that the act of ensuring liquidity was a critical role within his roles as a Chief Finance Officer. The claimant confirmed that the reason for termination was about the arrears on the loan facility and his failure to reply the email or taking action on the matter. He also confirmed that he discussed the issue with the directors.

RW testified that he never met the claimant on 25.08.2016 or 26.08.2016 to discuss the matter. The claimant was clear he never replied the email orally or in writing.

The Court finds that the email of 18.08.2016 amounted to a notice to show-cause. The further evidence is that 5 days to remedy the concerns raised lapsed and as per clause 28.1.1 of the employment agreement, the Court returns that the situation for gross misconduct and therefore summary dismissal accrued. The Court finds that by the evidence on record the respondent has established that the reasons for termination were valid, that is the arrears in issue existed on the loan facility, the matter fell within the role of the claimant as a Chief Finance Officer, and the claimant despite being asked by the email to explain, he failed to do so. The claimant has failed to show by evidence that as alleged in his pleadings, he was forced to resign at a meeting on 25.08.2016 and when he declined, he was dismissed. The Court finds that the claimant was invited to make an explanation but failed to do so and when the contractual 5 days for remedying the concerns lapsed without his reply, the respondent dismissed him as envisaged in the termination contractual clause. Looking at the flow of events, after the claimant failed to reply the email, a hearing as envisaged in section 41 of the Employment Act, 2007 would not serve a purpose because the claimant clearly had no explanation. Similarly, the administrative appeal process would not have served purpose even if it was invoked in the circumstances that the claimant had failed to reply the email. Whereas RW testified that he never discussed the issue with the claimant after he issued the email, the claimant testified that on 25.08.2016 he was summoned to the CEO's office and asked to resign. The claimant has not offered any reason why he did not offer an explanation in reply to the email and instead he testified that he had no evidence that he offered oral or written reply to the email. The Court returns that clearly the respondent substantially complied with notice by issuing the email and a hearing when the CEO summoned the claimant but the claimant failed to offer an explanation.

The parties spent considerable time in their evidence on whether the claimant or the respondent was liable for the turn of events about the facility arrears. The claimant stated that the respondent's directors were liable when they unilaterally withdrew some Kshs. 16, 000,000.00 that would have been used to liquidate some of the arrears in the sum of Kshs.15, 972, 233.65 that had been demanded. RW on the other hand took the view that the directors were not liable as the payment of the loan was out of a special account for that purpose. The Court considers that such were matters that the claimant should have raised in reply or in explanation after he received the email of 18.08.2016. Thus the Court returns that the claimant having failed to reply the email within the contractual 5 days, the respondent was entitled to proceed to dismiss the claimant. The Court returns that the reason for termination was valid as per section 43 of the Act as at the time of the dismissal and the reasons were not unfair in view of the provisions of the contractual termination clause as read with section 45 of the Act.

The Court returns that the termination was not unfair or unlawful in procedure or substance. The claimant is therefore not entitled to compensation under section 49 as was prayed for and no case for exemplary damages has been established as submitted for the respondent.

To answer the **4th issue** for determination the Court returns that the parties are in agreement that the claimant is entitled to the certificate of service. The prayer for 3 months' pay in lieu of notice is found unjustified as it lacks statutory or contractual basis. The court has considered the award of the certificate of service and all circumstances of the case including that the pay of Kshs.1,000,000.00 on a soft landing appears now declined as per the respondent's submissions and returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for:

- a. The prayers made for the claimant will fail except the respondent will deliver the certificate of service to the claimant within 7 days from the date of this judgment.
- b. Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 13<sup>th</sup> March, 2020.**

**BYRAM ONGAYA**

**JUDGE**