



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 2561 OF 2016**

**ANDIA LAURA CHAKAVA.....CLAIMANT**

**VERSUS**

**ALPHA AFRICA ASSET MANAGERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 14.12.2016, seeking the following orders-

- a. A declaration that the Respondent failed to comply with the mandatory provisions of the Constitution of Kenya 2010, the Employment Act, 2007 and the Claimant's letter of appointment and employment contract hence the termination was unfair and amounted to unlawful termination.
- b. Compensation for unfair and/or unlawful termination and loss of employment up to the maximum of 12 months basic salary (KShs. 850,000 x 12 = KShs. 10, 200,000.00).
- c. Unpaid housing allowance from February 2012 – March 2016 amounting to KShs.  $(\{15/100 \times 850,000\} \times 51 = \text{KShs. } 6,502,000.00)$ .
- d. Interest on (b) and (c) above at court rates until payment in full.
- e. Costs of this suit and interest thereon.
- f. Any other relief that this Honourable Court shall deem fit and just to grant in the circumstances.

2. The Respondent filed defence on 31.3.2017 denying that the termination of the claimant's services was unfair. She averred that the claimant was informed of the reason for termination, namely poor performance and she was accorded a chance to defend herself. She therefore averred that the termination of the claimant's employment was fair and as such she is not entitled to the reliefs sought in this suit.

3. During the hearing, both parties tendered evidence and thereafter filed written submissions.

**Claimant's Case**

4. The Claimant testified as Cw1 and basically adopted her witness statement dated 13.12.2016 and his bundles documents as his evidence in chief. In brief, she stated that the Respondent was registered in March 2012 and she got shares of 5%. In addition, she was employed by the company as the Managing Director vide the employment of letter of 1<sup>st</sup> February 2012. Her duties included-

- a. Developing strategic and financial plans for our client.
- b. Developing, implementing and monitoring annual budgets and business plans to ensure profitability.
- c. Developing, implementing and monitoring our client's risk management framework.

d. To provide strong leadership and effective management of the Respondent to encourage co-operation and teamwork, build morale and a strong sense of identity.

e. Ensuring shareholder value is created.

5. She further testified that though the contract remained unsigned, the terms and conditions of the contract were inferred by the parties' conduct. For instance, she was paid the salary of KShs. 700,000.00 stipulated in her letter of appointment and sat in board meetings. However, at the time of termination, she was earning a salary of KShs. 850,000.00.

6. She states that during the meeting held on 1.03.2016 to discuss the Respondent's strategy and human resource, she was informed by the Board that there was an issue to discuss and she was thereby excused from the meeting by the other directors for the deliberations to proceed. After twenty minutes she was called back into the meeting whereat, she was asked to resign from her position or else be dismissed.

7. She avers that she requested for time to consult and get back to the Board on 2.3.2016 but the request was denied and she was given a deadline of the following day. Additionally, her request to be given until 3.3.2016 to consult on the options given and confirm her decision was declined and on 2.3.2016 she was issued with a termination letter and asked to vacate the premises immediately.

8. She testified that her termination was unfair because the procedure set out in section 41 of the Employment Act was not followed. She contended that the reasons for which her employment was terminated were not fair or valid as required by sections 44 and 45 of the Act because she performed her duties as per her contract of employment and that she was never issued with a warning letter or notice in relation to the manner in which she discharged her duties. She further contended that on account of her good performance in the year 2015, she was paid a bonus of KShs. 208,250.00.

9. She further testified that the termination was unlawful because it did not comply with the provisions of section 24 (8) of the Capital Markets Act and Regulation 53 (b) of the Capital Markets Licensing General Requirement because it was done without first seeking an okay from the regulator. She deposes that on 7.6.2016, the Capital Markets Authority called a meeting where the Respondent sought to explain her failure to comply with the said provisions as the decision to terminate her employment was spontaneous.

10. She is of the view that the decision to terminate her employment was actuated by ulterior motive with the intention of ensuring that she was no longer a shareholder or an executive member of the management. She further contended that the Respondent failed to pay her house allowance during her tour duty contrary to section 31 of the Act and prayed for the same in arrears.

11. During cross examination, the Claimant stated that she was unaware of whether she was still a shareholder of the Respondent but contended that she had 50 shares in the company which she purchased using the KShs. 500,000.00 sign-on bonus that had been paid to her. She admitted that she was appointed as the Managing Director pursuant to article 109 of the Respondent's Articles of Association. She further admitted that her letter of employment that she had produced herein was not signed.

12. She also admitted that during her tenure of office from 2012 – 2016, the company never posted any profit but contended that the losses did not affect the creation of the company's share volume. She further admitted that the Board was concerned with the continued losses in the company but she contended that she was never called by the board to discuss her performance in any formal meeting. She denied that the board meeting on 1.3.2016 was to discuss her performance and maintained that the agenda for the meeting of 1.3.2016 was the review of the 2016 strategic plan. She admitted that when she was called back to the board meeting, she was told the reasons for which the board was contemplating to terminate her services but contended that she was not given a chance to defend herself. In her view, all what she did was to voice her opinion on the decision the board had taken and asked for an opportunity to consult.

13. She stated that she didn't know whether the Board breached the provisions of Article 109 of the Articles of Association which made provisions for the removal of a managing director. However, she contended that the Board breached the provisions of section 24 (8) of the Capital Markets Act and regulation 53 (b) of the Capital Markets Licensing General Requirements which required the Board to notify the Capital Markets Authority (CMA) in writing. She further contended that she lodged a complaint with CMA but she conceded that she did not know whether CMA had issued an objection to her removal. Finally, she contended that clause 109 of the Articles of Association contemplated payment of damages in the event the contract was breached by the Board.

### **Respondent's Case**

14. Muema Muindi testified on behalf of the Respondent as RW1. He adopted his witness statement dated 13.11.2018 as his evidence and produced the Respondent's bundle of documents as his exhibits. In brief, he stated that the Claimant failed to effectively discharge her duties thereby causing the Respondent to incur losses. He further stated that the Claimant failed to provide strong leadership and effective management that would have encouraged teamwork, built a strong corporate culture and motivated staff and which led to staff turnover. He also stated that the payment of the bonus to employees and directors was discretionary and was not pegged on good performance.

15. He further testified that the Claimant's presentation on 1.3.2016 was interrupted because the strategic plan was inadequate. He maintained that the Respondent had valid and fair reasons to terminate her employment since the company was making losses. He further contended that a company making losses cannot increase its share value as a potential investor looks at the profit made by the company.

16. He contended that the procedure used to terminate the claimant's services was in line with the Respondent's Articles of Association and she was given the opportunity to be heard. He denied the Claimant's testimony that she had requested to be given time to consult. He further contended that the termination did not contravene section 24 (8) of the Capital Markets Act and averred that the Capital Markets Authority had no objection to the termination of the Claimant's employment.

17. As regards the claimant's status in the company, he testified that the Claimant is still a shareholder and a director even after the

termination of her employment. Finally, he denied the claim for unpaid house allowance and contended that the salary of KShs. 850,000.00 per month paid to her was a consolidated pay.

18. During cross examination, he clarified that the comments on the unattractive governance structure during the board meeting related to another company in Mauritius and not the Respondent. He admitted that the Claimant's unsigned letter of appointment made provisions for leave and 3 months' salary in lieu of notice upon resignation or termination. He further admitted that the appointment letter referred to the Employment Act and not the Articles of Association. He also admitted that the Claimant's duties were not set out in the Articles of Association. He confirmed that when the business was starting up, there was staffing challenges because the business never specialized.

19. On the other hand, he admitted that the agenda for 1.3.2016 board meeting did not include the Claimant's disciplinary hearing or process and that neither was she issued with a notice to show cause or given prior notice. He testified that the Respondent conducted staff appraisals before terminating the services of the claimant but failed to produce the Claimant's appraisal report as exhibit herein.

20. He contended that the Respondent never hindered the Claimant from performing her duties as the Managing Director. He stated that the delay in signing the appointment letter and shareholders' agreement was occasioned by the Claimant. Finally, he contended that the Claimant misled the Respondent thereby occasioning her losses.

### **The Claimant's Submissions**

21. The Claimant in her submissions filed on 6.11.2019, submitted that this Court has the jurisdiction to hear this matter since there existed an employment relationship as acknowledged by the Respondent in the termination letter of 2.3.2016. She further submitted that she was an employee since her employment was governed by terms and conditions set by the employer; she was on the Respondent's payroll and was paid allowances; and finally, the respondent's Board had control over how she performed her duties.

22. She relied on the case *Everret Aviation Limited vs. Kenya Revenue Authority (Through the Commissioner of Domestic Taxes) [2013] eKLR* where court discussed the relevant factors to take into consideration in distinguishing between a contract of service and a contract for services including, the method of payment, arrangements for payment of income tax and national insurance contribution, and how the contract may be terminated, and finally whether the individual may delegate work.

23. The Claimant further submitted that the Respondent has failed to discharge her burden of proving that it had a valid reason for terminating her employment. It is submitted that RW1 admitted that she did not issue her with any warning on account of her performance and did not adduce any evidence to prove that the Respondent conducted a performance appraisal on her and put her on a performance improvement plan.

24. She relied *John Mokaya Maiko vs. Security (Msa) Limited [2018] eKLR*, *Isaac W. Wekesa vs. Kenya Forest Service [2019] eKLR* and *Ambani Ronald vs. Uma Nathwani Kishor Mandaliya Manoj Shah (The Trustees of Tumaini Home) & Another [2016] eKLR* where the Courts held that for an employer to terminate an employee's services on account of poor performance there should be proper performance measurements in place such as performance appraisals.

25. The Claimant further submitted that whatever reasons that exist to justify termination of employment, the mandatory procedure set out under section 41 of the Employment Act must be followed. She submitted that the Respondent did not follow the said procedure because she was not issued with a notice to show cause neither was she informed of the right to have a representative present at the hearing or given the opportunity to make her case before a decision could be arrived at.

26. She relies on the case of *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR* where the Court held that if an employer fails to follow the mandatory provisions of section 41 of the Employment Act, then the outcome of the process is bound to be unfair. She also relied on the case of *Davis Gichana Omuya vs. Mombasa Maize Millers Limited [2014] eKLR* where the Court held that the reasons an employer is considering terminating employment should be explained to the employee and thereafter the employee be given an opportunity to air his case for consideration before the employer makes the decision to terminate.

27. The Claimant submitted that since she has proved that her employment was terminated without a valid reason and without being accorded a fair hearing, she is entitled to compensation for unfair and unlawful termination under section 49 (1) (c) of the Employment Act. She stated that the claim for 12 months' compensation is justified taking into account the role she played in establishing the company, and also because she had legitimate expectation that she would serve in her position until the company breaks even.

28. The Claimant submitted that she is entitled to payment of house allowance by dint of section 31 of the Employment Act. She observed that the Respondent has not disputed that the letter of appointment and employment contract only made provision for gross pay. She relied on *Ayanna Yonemura vs. Liwa Kenya Trust [2014] eKLR* where the Court held that for an employer to exclude provision of housing or payment of rent to the employee, it is imperative that the contract of service specifically provides that the salary paid is consolidated salary. Finally, she urged this Court to award her costs.

### **The Respondent's Submissions**

29. The Respondent submitted that the termination of the Claimant's employment was not an ordinary termination as the Claimant was a Managing Director which is governed by Part IX of the Companies Act and the company's Memorandum and Articles of Association. Accordingly, she urged that under section 139 (1) of the Companies Act and clause 109 of her Articles of Association, the company can remove a director by ordinary resolution before the end of their period in office notwithstanding anything contrary. She contended that there was no need to issue a justification for the claimant's removal. She further contended that the Claimant ought to have known that her performance was under review having considering the agenda of the meeting.

30. She further submitted that the termination of the Claimant's employment on account of the strategic plan which she presented to the board was fair because the reason was valid and fair. According to her the strategic plan lacked strategic content because it lacked summary of past deliberations, failed to give the strategic direction taken by the Respondent, was a repetition of previous presentations and was based on unsupported assumptions.

31. As regards the procedure followed before termination the contract of service, the Respondent submitted that the procedure used to terminate the Claimant's employment was fair because the reasons for the termination were explained to her and she was granted an opportunity to be defend herself and she never sought adjournment to enable her prepare for her case if she felt that the notice was short. As regards the issue of having a representative of her choice present during the hearing, the Respondent submitted that the Claimant admitted during her evidence herein that she never asked to be allowed to have a representative at the hearing, before the hearing.

32. Finally, the Respondent submitted that the suit lacks merits and the claimant is not entitled to the reliefs sought because she failed to adhere to her contract of employment, the Constitution and the Employment Act. She further urged that the Claimant has not proved violation of any of her constitutional rights and contended that the Employment Act is not applicable in the circumstances of this case.

33. She further submitted that the unsigned letter of appointment produced by the claimant as exhibit is invalid and the term set out therein cannot be relied upon by the Court. For emphasis she relied on ***Abdallah Mumba Mgandi & 5 Others vs. Mombasa Polythene Bags Limited & Another [2019] eKLR***.

34. She concluded by urging that the claim for compensation for unfair termination and unpaid house allowance is not justified because the termination was fair and the claimant's salary was gross pay.

#### **Issues for determination**

35. After carefully considering the pleadings, evidence and submissions by both parties, I find no dispute in the fact that the claimant was a shareholder, a director and an employee of the respondent. As the Managing Director of the respondent, the claimant was an employee under a contract of service within the meaning of section 2 of the Employment Act, and this court has jurisdiction to determine the suit, because he was earning a salary and she worked under the control of the respondent's board of directors. It is also common ground that the claimant's written contract of employment was never signed but the parties herein upheld the terms in the unsigned contract to govern their employment relationship until 2.3.2016 when the Claimant's employment was terminated by the respondent. The main issues for determination therefore are-

- a. Whether there was valid and fair reason(s) for terminating the Claimant's contract of employment.
- b. Whether the procedure followed was fair.
- c. Whether the Claimant is entitled to the reliefs sought.

#### **Analysis and determination**

##### **a. Whether there was valid and fair reason(s) for the termination**

36. Under section 43 of the Employment Act, an employer is required to prove the reason(s) for the termination, and where one fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. Section 45 of the Act bars an employer from terminating his employee's contract unfairly and provides as follows-

**“(1) No employer shall terminate the employment of an employee unfairly.**

##### **2. A termination of employment by an employer is unfair if the employer fails to prove—**

**a. that the reason for the termination is valid;**

**b. that the reason for the termination is a fair reason—**

**i. related to the employee's conduct, capacity and compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure.”**

37. In this case the Claimant's employment as a managing director was terminated on account of her poor performance which had allegedly occasioned to the Respondent an accumulated loss of KShs. 170 million since the inception of the company. The Claimant denied the alleged poor performance and contended that she was neither subjected to a performance appraisal and a performance improvement plan nor was she issued with any warning for the alleged poor performance. Rw1 contended that a performance appraisal was done before the termination, but he did not produce any documentary evidence to support the said allegation. Consequently, I find that, the respondent has failed to prove that she conducted a performance review for the claimant before terminating her services on the ground of poor performance. As such, I proceed to hold that the employer herein has failed to prove on a balance of probability that the reason cited for terminating the claimant's contract of service was valid and fair within the meaning of section 45 of the Act.

38. The foregoing view is fortified by the case of *National Bank of Kenya vs. Anthony Njue John* [2019] e KLR where the Court of Appeal held as follows on the issue of termination on account of poor performance-

**“The reason advanced by the Bank for terminating the respondent’s employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)* the court observed as follows;**

**a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.**

**b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.**

**c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.**

**d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”**

**b. Whether the procedure followed was fair.**

39. Section 41 of the Employment Act requires that before terminating the services of an employee on account of misconduct, poor performance, or physical incapacity the employer must explain the reasons to the employee and give the employee an opportunity to present his/her case.

40. The said proceeding must be conducted in a language of the employee’s understanding and in the presence of another employee or shop floor union representative of the employee’s choice, and the views of the employee and his chosen companion must be considered before the termination is decided.

41. The Claimant stated that she was never issued with any notice to show cause nor was her performance one of the agenda for discussion during the board meeting on 1.3.2016. She further contended, and the Rw1 admitted, that she was not informed that the proceedings of the board meeting on the said date could lead to her dismissal on account of poor performance and she was not given the right of being accompanied by another employee of her choice to the board meeting. She further contended and RW1 admitted that the claimant was asked to leave the meeting and when she was called back to the meeting after twenty minutes, a decision to terminate her services had already been made, and the only option left for her was resignation to save her professional image.

42. Applying the mandatory procedure set out under section 41 of the Employment Act to the facts of this case, I must return that a fair procedure was not followed by the respondent before terminating the services of the claimant. The claimant was not given any opportunity to defend herself as required by section 41 of the Act because all what she was told was to choose between tendering her resignation or being dismissed for the alleged poor performance. Section 41 states that: -

**“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.”**

43. As regards removal of the claimant as Managing Director under article 109 of the Articles of Association, it is evident from the letter of 7<sup>th</sup> June 2016 by the Capital Markets Authority to the Respondent informing her that she could not make changes on the shareholders, directors, chief executives or key personnel without prior confirmation from the regulator in writing, that it has no objection to the changes. It follows that, the power to remove the Claimant from her position as the Managing Director was subject to approval by the regulator by dint of Regulation 53 (B) of the Capital Markets Licensing General Requirements. Consequently, I agree with the claimant that the termination of her services as the respondent’s Managing Director was also unlawful within the of the said Regulation for want prior permission from the regulator.

**Reliefs Sought**

44. In view of my finding herein above that the respondent has failed to prove that the termination of the Claimant’s employment was grounded on valid and fair reason(s) and that fair procedure was followed as required by section 45 (2) of the Employment Act as read with Regulation 53 (B) of the Capital Markets Licensing General Requirements, I make a declaration that the termination was unfair and unlawful

as prayed.

45. Flowing from the foregoing, and pursuant to section 49(1) of the Employment Act, I award the Claimant 10 months' salary compensation for unfair termination having considering her length of service to the Respondent, and the fact that her chances of getting another job of such rank within a shorter period is minimal. Finally, I have considered the fact that the respondent did not prove any misconduct against the claimant that contributed to the termination.

46. The claim for house allowance fail because the claimant admitted that her salary of kshs.700,000 and later kshs.850,000 was a gross pay which is allowed under section 31 (2) (a) of the Employment Act. The said provision states that: -

**“This section shall not apply to an employee whose contract of service –**

**a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation.”**

**Conclusion and disposition**

47. I have found that the termination of the claimant's services by the respondent herein was unfair and unlawful because it was not grounded on valid and fair reason(s), a fair hearing was not accorded to her, and the respondent did not seek the approval of the Capital Market Authority before the termination. I have further found that the claimant is entitled to compensation for unfair termination and I therefore enter judgment for her in the sum of kshs 850,000 x 10 months equaling to kshs. 8,500,000. The above award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

**Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of March 2020**

**ONESMUS N. MAKAU**

**JUDGE**