



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2445 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**FELIX ODHIAMBO OWUOR.....CLAIMANT**

**VERSUS**

**ELECTORAL INSTITUTE FOR SUSTAINABLE DEMOCRACY IN AFRICA.....RESPONDENT**

**JUDGMENT**

The suit herein is filed by the claimant against the Respondent, a not for profit organization established in 1996 and registered under the Non-Governmental Organization Coordination Act, with offices based in Johannesburg, South Africa. The respondent has country offices in several countries including Kenya. Its purpose is to support the electoral process and promote free and fair elections. It relies on donor funding for its operations. Among the donors are the Swedish International Development Co-operation (SIDA) and Danish Ministry of Foreign Affairs (DANIDA).

The Claimant was employed by the Respondent and served in the capacity of country director until his employment was terminated on 19<sup>th</sup> December 2016.

The Claimant instituted this suit vide the Statement of Claim filed on 25<sup>th</sup> November 2016 which was amended vide the Amended Statement of Claim filed on 13<sup>th</sup> February 2017 wherein the Claimant sought the following reliefs-

- a. That the decision by the Respondent to shut down the Kenyan Country office amounts to wrongful, unfair, unjustifiable and illegal termination of employment.
- b. That the intended termination of the Claimant's services by the Respondent be declared wrongful, unfair, unjustifiable and illegal.
- c. The funds of Kshs.65.2 million from SIDA and Kshs.51 million from DANIDA in the NIC Bank Account EISA-1 No. [particulars withheld] and EISA-5 [particulars withheld] respectively retained and appropriated towards the settling the entitlement of the employees affected by the Respondent's decision to shut down the Kenya Country Office.
- d. That the Claimant be paid USD 227,022 being his total entitlement, as follows-
  - i. 12 months aggregate pay (USD 12,614 x 12 months = USD 151,368).
  - ii. Outstanding pay for the month December 2016 (USD 12,614 – 7624 = USD 4990).
  - iii. Severance pay as follows
    - i. 15 days for 9 months worked in 2010 (716 x 9 = USD 6450).
    - ii. 15 working days in every year for 6 years 2011-2016 (USD 8600 x 6 years = USD 51,600).
  - iv. 1 month's salary in lieu of notice being USD 12,614.
- e. That the Claimant be awarded the costs of the entire suit.

f. Interest on item (d), (i), (ii), (iii) and (iv) until payment in full.

g. Any other reliefs that the Court may deem just and expedient.

The Respondent filed its reply to the amended claim on 23<sup>rd</sup> June 2017, denying the averments in the statement of claim and seeking to have the suit dismissed with costs to the Respondent.

The case was by consent of parties disposed off by way of written submissions.

### **The Claimant's Case**

The claimant's case is that on 19<sup>th</sup> October 2019, the Respondent's contract with the SIDA was terminated due to an audit conducted to investigate alleged theft of funds by one Mr. Nicholas Imbugwa, a Swedish Embassy employee that led to loss of funds. Further, on 7<sup>th</sup> November 2016, DANIDA terminated its bilateral agreement with the Respondent.

As a result, the Respondent was required to refund the unused funds for salaries and statutory deduction in its bank accounts at NIC Bank, Kshs.65.2 million and Kshs.51 million to SIDA and DANIDA respectively.

It is the Claimant's case that on 15<sup>th</sup> November 2016, the Respondent's operations director in Johannesburg informed the Respondent's employees at the country office that the Kenyan office would not remain open beyond the end of November 2016 due to termination of the Respondent's contracts with SIDA and DANIDA and the request for the return of funds.

It is the Claimant's position that the Respondent was in a healthy financial position and the intention to close the Kenyan office was not related to its financial vulnerabilities as it had funds of UKE 800,000.00 from the United Kingdom Department and US\$ 3,241,476.00 from the USAID-IFES. It is his case that the Respondent has been communicating with potential donors without reference to the Claimant, with the intention of diverting funds from Kenya to Johannesburg.

The Claimant avers that he was invited to a disciplinary hearing on 19<sup>th</sup> December 2016, at the Crowne Plaza Hotel where he was also to collect a laptop that had been taken away from him by the Respondent. However, he did not attend the disciplinary meeting. As a result, his employment with the respondent was terminated the same day.

According to the Claimant, Ilona Tip and Denis Kadima officers of the respondent, prepared minutes of the disciplinary proceedings against the Claimant and put pressure on Robert Gerenge, another officer, to sign the same to confirm that his dismissal had been effected on 30<sup>th</sup> November 2016. Robert declined to do so and they forged his signature.

The Claimant avers that the Respondent's actions are unlawful, unprocedural, unconstitutional and devoid of fair administrative action.

### **The Respondent's Case**

The Respondent avers that the Claimant compromised the integrity of his office when he was in the Respondent's employ.

The Respondent contends that the Claimant was notified of the disciplinary hearing, accorded an opportunity to show cause and be heard but chose not to respond to the show cause letter or respond to the allegations made against him or even to request for an adjournment or seek further directions on the matter. The Respondent avers that the disciplinary proceedings were conducted in accordance with its human resource manual, the Constitution of Kenya and the Fair Administrative Action Act. As such, there has been no violation of the Claimant's rights.

The respondent contends that the Claimant's acts led to the recall of funds. The Respondent further contends that due to the Claimant's conduct, an audit was carried out by its major donors which revealed that he had dealings with one of the donors' employees with the intention of transferring monies from the donor funded projects.

It is the Respondent's position that the Claimant has moved this Court prematurely having not utilized the opportunity accorded to him by the Respondent. As such, this suit is an abuse of the Court process. Further, that the Claimant was the reason donors withdrew their funding hence he should not be allowed to benefit from the hardship he has occasioned the Respondent.

Vide the Affidavit of Ilona Tip sworn on 4<sup>th</sup> September 2019, the Respondent contends that it is still in operation with no intention of closing its offices in Kenya. That any intention to cease acting must first be communicated to the Non-Governmental Coordination Board, before the same can be done.

Ilona Tip deposes that the Claimant was responsible for overseeing the implementation of the bilateral agreement. That on 12<sup>th</sup> May 2016, the Claimant was asked to stop any further payments using the Swedish grant due to existing irregularities in the project implementation. He was issued with another letter on 27<sup>th</sup> June 2016, requesting him to provide bank statements for purposes of an audit. The audit was conducted and on 25<sup>th</sup> July 2016, the Danish Embassy informed the Claimant of its concerns regarding the misappropriation of funds by the Respondent's employees.

She deposes that on 6<sup>th</sup> December 2016, the Claimant was sent a reminder of the show cause letter that had been given to him on 29<sup>th</sup>

November 2016. Having failed to respond on both occasions, on 12<sup>th</sup> December 2016, the Claimant was sent a hearing invitation scheduled for 19<sup>th</sup> December 2016 which he chose not to participate in despite being at the venue. The meeting was held in his absence and a decision to terminate his employment was made by the disciplinary committee.

She further deposes that the Claimant absconded work from 10<sup>th</sup> November 2016 until the date of the termination of his employment. That the period he absconded duty was deducted from his outstanding leave days. She deposes that the claim for payment of one month's salary in lieu of notice is unfounded as the Claimant was served with a notice. That the claim for 30 days' unpaid leave is unfounded since the claimant took 9 days paid annual leave and the only leave days due to him as at 31<sup>st</sup> December 2016 were 15.9 days in addition to the 13 days remaining in December and which was paid on 12<sup>th</sup> January 2017. As such, the claim for salary for December 2016 has no basis.

### **The Claimant's Rejoinder**

On 4<sup>th</sup> September 2017, the Claimant filed a rejoinder vide his affidavit sworn on 4<sup>th</sup> September 2017. He contends that he performed his duties diligently and exceptionally. That the Respondent was fully aware of the preliminary nature of the audit report and it was its decision to ignore the responses and the documents issued to the auditors by the Respondent.

He reiterated that the Respondent had ceased operations in Kenya as it terminated the services of all its employees and disposed of its equipment and inventories. It is his averment that the Respondent closed shop prematurely as it had other sources of funding. That the respondent did not exhaust the dispute resolution mechanisms provided for in the agreement with the donors who withdrew their funding.

He deposed that the decision to subject him to disciplinary proceedings was an afterthought aimed at defeating justice. That he responded to the show cause letter through his advocates. That the Respondent has not adduced any evidence to prove that there was improper conduct on his part.

He deposed that on 19<sup>th</sup> December 2016, he received a letter from Denis Kadima informing him that the second audit that had been carried out exonerated the Respondent. However, the Respondent refused to share the Final Audit Report. It is his averment that the preliminary audit report relied upon by the Respondent arrived at the conclusion that there was no evidence of transfer of funds to him.

The Claimant deposes that the findings of the preliminary audit report were that the Respondent was forcing the Claimant to withdraw huge sums of money from the Kenyan bank account, to support EISA offices in Somalia, something the claimant had cautioned the respondent about as it was a violation of the financial and anti-money laundering laws in Kenya and was prejudicial to the employees.

It is the Claimant's deposition that his laptop was confiscated, and an electronic forensic audit carried out, which yielded no evidence to support the Respondent's claim that there had been improper contact between him and one of the donors' employees.

The Claimant deposed that the letter to show cause referred to by the Respondent had no bearing to the allegations raised by the Respondent and was drafted in vague terms without itemizing the charges levelled against him. It is his position that his response constituted a sufficient rebuttal to the charges against him. He maintains that no disciplinary hearing was ever conducted and that the one initiated was an afterthought since he had already filed a case in court.

He avers that on 19<sup>th</sup> December 2016, the Executive Director informed him that SIDA had restored bilateral relations but was reluctant to continue working with him.

On 19<sup>th</sup> September 2019, the Claimant filed a rejoinder to respond to the issues raised in the affidavit of Ilona Tip. He avers that the Respondent's assertion that its offices are still open is false and misleading as it has no registered office. He contends that a certificate of incorporation and filing NIL returns is not proof of a functioning office. He further avers that the termination of staff contracts on 29<sup>th</sup> November 2016 and disposal of all the office equipment and inventories is sufficient proof that the Respondent has ceased its operations in Kenya. That such action amounted to redundancy declaration.

The Claimant maintains that the Respondent was fully aware of the circumstances that triggered the audit by the Swedish Embassy being, the alleged theft by a Swedish Embassy employee. Despite this, Kenya was still allowed to charge salaries.

He deposed that the reason he was at the Crowne Plaza on the date of his disciplinary hearing was because he had been invited to have discussions aimed at finding an amicable solution. That upon sending a settlement proposal as had been agreed, he received a dismissal letter.

He deposed that the minutes of the disciplinary hearing are not authentic, therefore null and void. He maintains that the Respondent deducted his salary by computing only 13 days despite there being an email indicating that the Board had set the closing day as 16<sup>th</sup> December 2016. That breaking for the holidays early had been a customary practice over the years.

### **Claimant's Submissions**

In his submissions filed on 19<sup>th</sup> September 2019, the Claimant submits that the termination of his employment was unlawful, unprocedural, unconstitutional and contrary to section 44 (2) and 45 (2) of the Employment Act. He relies on the case of **Mary Mutanu Mwendwa v Ayuda Ninos De-Africa Kenya (ANIDAN) [2013] eKLR** where the Court observed that section 45 (2) requires an employer to prove the validity and fairness of a termination even if it is for operational reasons. He further submits that the Respondent is not experiencing shortage of funds hence there was no valid reason to warrant termination of his employment.

The Claimant submits that the Respondent had the obligation of paying him his full monthly salary and not 13 days' salary since it had been earlier communicated that the end of the year closure would be on 16<sup>th</sup> December 2016.

The Claimant submits that the signature of Robert Gerenge appended to the minutes of the disciplinary meeting was forged hence his employment was terminated in the absence of a disciplinary hearing and is thus unfair. He relies on the case of **Donald Odeke v Fidelity Security Limited [2011] eKLR** where the Court observed that it does not matter what offence an employee is accused of, if they were not heard then the termination is *ipso facto* unfair.

The Claimant submits that he had the legitimate expectation that he would serve his contract until November 2017 and have it renewed following a favourable appraisal.

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

In its submissions filed on 9<sup>th</sup> October 2019, the Respondent submits that the Claimant's allegation that his employment was terminated on account of redundancy is untrue as the communication of 15<sup>th</sup> November 2016 informing its employees that it was highly unlikely that the Kenya office would remain open beyond 30<sup>th</sup> November 2016, was not to be construed as a redundancy declaration. Further, its offices were never closed as it was exonerated from the allegations of mismanagement of funds.

The Respondent submits that the Claimant was not declared redundant as the termination of his employment was based on his misconduct.

The Respondent submits that the procedure as stipulated in Section 41 of the Employment Act was followed. The Claimant was informed of the charges against him vide a notice to show cause. He was issued with a reminder and invited to a disciplinary hearing. However, his advocates responded to the same stating that the Claimant would not participate in any disciplinary proceedings. The disciplinary committee held the meeting and resolved to dismiss the Claimant effective 19<sup>th</sup> December 2016.

The Respondent submits that the termination of the Claimant's employment was justified since the Claimant had been involved in malpractices of financial mismanagement.

### **Analysis and Determination**

After carefully examining the pleadings, affidavits and the annexures thereto as well as the submissions by parties and their counsels, the following are the issues for determination –

1. Whether the Claimant was declared redundant or his employment was terminated.
2. Whether the termination of the Claimant was lawful and fair.
3. Whether the Claimant is entitled to the reliefs sought.

### **Nature of the Termination of the Claimant's Employment**

It is not disputed that the Respondent communicated to its employees that because of the recall of funds, there was a possibility that the organization would not operate beyond 30<sup>th</sup> November 2016. However, the Claimant was never declared redundant as he was issued with a notice to show cause before the said date. Disciplinary proceedings were conducted in his absence and decision arrived at to terminate his employment.

### **Whether the termination of the claimant was lawful and fair**

The Respondent submitted that the Claimant was afforded an opportunity to present his case before the disciplinary committee but opted not to attend. This is confirmed by the Claimant's advocates' letter of 4<sup>th</sup> December 2016 to the Respondent, informing the Respondent that the Claimant will not participate in the disciplinary proceedings because the issues that formed the basis of the notice to show cause were the subject of this suit.

By failing to attend the disciplinary hearing the Claimant waived his right to claim for unfair termination. In the case of **Cause 1660 of 2013; BIFU v Barclays Bank of Kenya [2014] eKLR**, it was held that an employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause. The pendency of this suit was not a justifiable reason for the Claimant's failure to attend the disciplinary hearing as there was no order of the court stopping the same. Further, the Claimant was in the premises where the hearing took place.

Having been issued with notice to show cause and invited to a disciplinary hearing, the respondent complied with the procedural requirements of Section 41. The reasons for dismissal having not been rebutted by the claimant at the disciplinary hearing, he cannot complain about the validity of the same.

By failing to attend the disciplinary proceedings, the Claimant waived his right to claim for unfair and unlawful termination. As such, the termination of his employment was justified and procedural.

### **Reliefs Sought**

Having failed to establish that the termination of his employment was unfair, the claimant is not entitled to any of the reliefs sought with the result that the entire claim fails and is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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**