



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1015 OF 2016

MICHAEL NJOROGE NGANGA.....CLAIMANT

VERSUS

HOME AFRIKA LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 17 September 2019, 15 October 2019, 26 November 2019 and 28 January 2020. The judgment could not be delivered on the scheduled date due to the COVID19 pandemic.
2. Michael Njoroge Nganga (Claimant) and a Legal Officer with Home Afrika (Respondent) testified.
3. None of the parties filed submissions within the agreed timelines, even the extended timeline of 30 April 2020.
4. The Court has considered the pleadings and evidence.

Unfair termination of employment

Procedural fairness

5. The Claimant entered into a contract of employment with the Respondent to serve as the Chief Executive Officer on 1 November 2013. The contract was to run for 3 years.
6. On 1 September 2015, the Respondent's Chairman wrote to the Claimant giving him 3-months' notice of the termination of his contract, and the reason given was *continued poor performance of the company* (under the Claimant's leadership).
7. The termination notice cited article 2.2 subsection 2 of the employment contract and a meeting of the Board held on 31 August 2015.
8. The Claimant was aggrieved and on 30 May 2016, he instituted these proceedings against the Respondent alleging unfair termination of employment.
9. In challenging the fairness of the decision, the Claimant asserted that he was not afforded an opportunity to be heard on the allegations leading to the decision to terminate his employment.
10. Section 41 of the Employment Act, 2007 envisages the employer informing the employee of the reasons why it is contemplating the termination of contract and affording the employee an opportunity to make representations.
11. In her witness statement filed in Court on 17 September 2019 and which was adopted as part of the evidence, the Respondent's Legal Officer stated in paragraph 8 that *no notice or due process was required for the disengagement* with the Claimant.
12. The Respondent's witness was, in essence, admitting that the Claimant was not afforded an opportunity to be heard before the decision to terminate was made on 1 September 2015, and since the requirement to be afforded an opportunity is a peremptory precept, the Court can conclude that the termination of the Claimant's employment was procedurally unfair as it did not meet the statutory minimum.

Substantive fairness

13. Having concluded that the termination of the Claimant's employment was procedurally unfair, it is not strictly necessary for the Court to examine whether the Respondent discharged the burden of proving, and proving as valid and fair the reason(s) for bringing the contract to an

end as was expected of it by sections 43 and 45 of the Employment Act, 2007.

14. However, the Court notes that the Claimant had as early as 29 April 2015 brought to the attention of the Respondent's Board serious concerns on corporate governance and made recommendations on the way forward. The concerns included conflict of interest on the part of the Board members and failure to constitute statutory committees.

15. The Court also notes that the Respondent did not place before the Court any formal performance evaluation/appraisals in respect of the Claimant to show wanting performance, despite the contract of employment providing for performance reviews twice a year.

Compensation

16. The Claimant served the Respondent for about slightly under 2 years. He was on a fixed-term contract which had about 1 more year to run and had a legitimate expectation to work through the term of the contract.

17. In consideration of these factors, the Court is of the view that the equivalent of 6 months gross salary would be appropriate as compensation (gross salary as of December 2014 was Kshs 1,126,096/-).

Breach of contract

Salary in lieu of notice

18. The Respondent admitted in its letter of 27 October 2015 that the Claimant was entitled to 3-months' salary in lieu of notice. Relief is allowed.

Accrued leave

19. The Respondent also admitted in the aforesaid letter that the Claimant was eligible for payment in respect of 30 days accrued leave. The relief is allowed.

Unpaid salary/allowances

20. The Respondent also acknowledged that the Claimant was entitled to unpaid salary/allowances from March to August 2015 and relief is granted.

Golf club membership, entertainment allowance and medical cover

21. The Claimant's contract provided for certain allowances and the Claimant contended that he was entitled to the same until the time the contract should have lapsed.

22. These allowances were facilitative, and in the view of the Court did not become due or owing after the termination of the contract, however unfair.

Commissions

23. The Claimant sought Kshs 7,000,000/- said to be 35% commission from his origination of a project called Migaa-Wadi Degla.

24. The contract of employment did not expressly provide for the payment of commissions and, therefore, the Claimant anchored this head of the claim on purported meetings of the Board where resolutions were said to have been made.

25. Towards this end, the Claimant produced copies of minutes of a meeting held on 21 January 2015 and a follow-up Memo dated 16 July 2015 he addressed to the Chairman of an entity called *Home Afrika Communities Ltd* (the Memo referred to deliberations by the Board of *Home Afrika Communities Ltd* held on 15 July 2015 but minutes of the meeting were not produced in Court).

26. The minutes of the meeting held on 21 January 2015 and produced in Court were not signed, and the Court cannot solely rely on them. They are not of much evidential value as the Claimant did not give the Respondent a *Notice to Produce* certified copies of the minutes before opting to rely on the unsigned and uncertified copies.

27. Without determining the authenticity or weight to be assigned to the unsigned minutes, the Court observes that *Home Afrika Communities Ltd* was not made a party to these proceedings nor was sufficient evidence led as to its legal connection with *Home Afrika Ltd*, the Respondent.

28. The Court finds that the Claimant did not prove this head of the claim to the requisite standard.

Conclusion and Orders

29. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(i) Compensation **Kshs 6,756,576/-**

30. If any of the dues admitted in the Respondent's letter of 27 October 2015 have not been paid, the Respondent should pay them as part of the award herein.

31. The sums to attract interest at court rates from 30 May 2016 if not paid on or before 30 July 2020.

32. The Claimant did not file submissions within the agreed timelines and is denied costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 29th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Koech instructed by Nyiha Mukoma & Co. Advocates

For Respondent Mr. Mulaku instructed by Namada & Co. Advocates

Court Assistants Lindsey/Judy Maina