



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 61 OF 2018

JUDITH AUMA JOWI.....CLAIMANT

v

KINANGOP DAIRY LIMITED.....RESPONDENT

RULING

1. Judith Auma Jowi (Claimant) instituted legal proceedings against Kinangop Dairy Ltd (Respondent) on 15 March 2018 alleging unfair termination of employment and breach of contract.
2. On 22 September 2020, the Respondent filed a Notice of Preliminary Objection to the Cause on the grounds
 1. THAT this Honourable Court lacks jurisdiction to hear and determine this matter.
 2. THAT the Claimant was summarily dismissed during probation contract which bars her from making a complaint under section 47 of the Employment Act.
 3. The suit therefore fails.
3. The Claimant filed Grounds of Opposition on 4 November 2020 contending
 1. THAT the Respondent's preliminary objection herein is misconceived, misdirected and an abuse of the due process of this Honourable Court.
 2. The issues raised in the preliminary objection are issues of fact which call upon this Honourable Court to determine the same by way of evidence.
 3. The Claimant's services were terminated by the Respondent not summarily dismissed but even if they were summarily dismissed as alleged, under section 47(3) of the Employment Act, 2007, the Claimant has the right to complain to this Honourable Court on the same.
 4. THAT due to the foregoing circumstances, this Honourable Court has jurisdiction to hear and determine the Claimants claim herein.
4. Pursuant to Court directions issued on 4 November 2020, the Respondent filed its submissions on 13 November 2020 while the Claimant filed her submissions on 20 November 2020.
5. The Court has considered the Motion, affidavits and submissions.
6. The Claimant was issued with a letter of appointment dated 29 August 2017 by the Respondent. The contract was subject to 6-months' probation.
7. On 17 November 2017, the Respondent notified the Claimant of the termination of her contract.
8. The Claimant then moved the Court prompting the challenge by the Respondent.
9. Section 47(6) of the Employment Act, 2007 upon which the objection is anchored provides **No employee whose services have**

been terminated or who has been summarily dismissed during a probationary contract shall make a complaint under this section.

10. According to the Respondent, because the Claimant's contract was subject to 6-months' probation and she had barely served for 2-months, she was disentitled from bringing a claim for unfair termination of employment (reference was made to *John Muthomi Mathiu v Mastermind Tobacco (K) Ltd* (2018) eKLR.

11. In the view of the Respondent, the consequence of section 47(6) of the Employment Act, 2007 was that the Court lacked jurisdiction to entertain the claim.

12. Section 47(6) of the Employment Act, 2007 refers to a *probationary contract*.

13. A *probationary contract* is defined in section 2 of the Act as means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.

14. The Court has relooked at the letter of employment issued to the Claimant. At clause 4 it stated

PROBATIONARY PERIOD

The first six (6) months of your employment shall be treated as a probationary period during which either party may terminate this contract by giving not less than seven (7) days' notice in writing at any time. The company may terminate this contract by paying seven (7) days salary in lieu of such notice.

15. Apart from providing that the first 6 months would be treated as a probationary period, the contract did not provide that would for less than 12-months as contemplated in the statutory definition of a *probationary contract*. The contract was of indefinite duration.

16. The consequence of the statutory definition of a *probationary contract* leads the Court to the conclusion that there is a legal distinction between a *probationary contract* and a contract with a probation period.

17. The Court is therefore of the view and so finds that the contract in question was not a *probationary contract* as contemplated in ordinary employment law of general application but a contract with a probationary period.

18. Since the Claimant's contract was not a *probationary contract*, the Court holds that section 47 of the Employment Act, 2007 is not implicated. The Court has jurisdiction.

19. The Notice of Preliminary Objection dated 21 September 2020 is dismissed with costs.

20. Despite the conclusions herein it may be necessary for the draftsman to relook at sections 42 and 47 of the Employment Act, 2007 to clarify the use of the terms *probationary contract* and *probationary period*.

Delivered through Microsoft teams, dated and signed in Kisumu on this 11th day of December 2020.

Radido Stephen

Judge

Appearances

For Claimant Amos O. Oyuko & Co. Advocates

For Respondent Wandune Associates

Court Assistant Chrispo Aura