



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1445 OF 2016**

**KEVIN ISIKA MULE.....CLAIMANT**

**- VERSUS -**

**HFC LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2019)**

**JUDGMENT**

The claimant filed the memorandum of claim on 25.07.2016 through G.M. Mugo Advocates and subsequently changed the Advocates to K.N. Mburu & Associates, Advocates. The claimant prayed for judgment against the respondent for:

- a) An injunction restraining the respondent from withholding the claimant's wages, salary, emoluments and benefits.
- b) An injunction restraining the respondent from terminating the claimant unlawfully from his employment and position.
- c) A mandatory injunction compelling the respondent to reinstate the claimant to his employment position.
- d) In alternative to a, b, and c above, terminal benefits in the sum of Kshs. 6, 400, 328.00.
- e) In alternative to a, b, and c above, 2017 bonus in the sum of Kshs.724, 981.00.
- f) In alternative to a, b, and c above, compensatory damages for lost salary and allowances for 3 years in the sum of Kshs.41, 893, 056.00.
- g) In alternative to a, b, and c above, compensatory damages for lost bonuses for 3 years in the sum of Kshs.2, 174, 943.00.
- h) Interest on d, e, and f above at commercial rates.
- i) General damages.
- j) Costs of the complaint.
- k) Any other or further relief as the Honourable Court may deem fit to grant.

The claimant's case is that at all material times to the suit and in particular from 19.03.2015 to 20.06.2016 being a certified public accountant and a banker by profession with 18 years experience was employed by the respondent as the Director Credit Risk and he discharged his duties diligently and professionally. The claimant was initially employed by Housing Finance Company of Kenya currently known as HF Group effective 01.02.2014 and was transferred to the respondent on the same post, duties, terms and benefits upon reorganisation that gave birth to HF Group that saw staff of Housing Finance Company Limited transferred to its new subsidiary HFC Limited (the respondent).

The claimant's further case is that his employment was terminated about 20.06.2016 when he was locked out of his office thereby summarily dismissing him from employment without any substantive or justifiable reason to do so.

The claimant's further case is that he observed matters he believed to adversely affect the respondent's overall performance and the respondent suffering statutory and regulatory non-compliance in matters related to credit, risk, financial reporting, corruption, malpractice, malfeasance, conflicts of interest and inefficiency. He severally advised the Group Managing Director (Frank Ileri) and the respondent's Managing Director (Sam Waweru) of matters that are of great concern to the claimant in his professional capacity regarding improving the

performance of the respondent. In those circumstances, it is the claimant's further case that on Friday 17.06.2016 he was invited to meet the respondent's Managing Director Sam Waweru at the Serena Hotel in Nairobi at 6.00pm. At that meeting Sam Waweru delivered to the claimant a show-cause letter dated 17.06.2016 requiring him to reply by Monday 20.06.2016 at 8.30am. The letter set out 4 allegations against the claimant including failure to apologise about grievances by the staff in debt management; failure to recruit a valuer as instructed by the Group MD by the email of 21.07.2015; report to work late and leaving early without permission or lawful cause and the perpetual absenteeism and lateness had been brought to his attention; and disregarding various lawful instructions like on the numerous occasions as particularised in the letter.

The claimant's further case was that the weekend allowed to reply was short and he was unable to compile relevant information to effectively reply. Further in the process of preparing the reply on Saturday 18.06.2016 he was unable to access the respondent's electronic system. On Monday 20.06.2016 from about 7.00am he tried to complete his reply and to upload from the house so as to meet the 8.30am deadline but he failed to access the electronic system. He decided to go to the office physically but he managed to arrive at the office at 10.30am. The claimant states that he noted his office had been ransacked and just before noon he received from the two human resource a letter signed by Sam Waweru inviting the claimant for disciplinary hearing at noon that day. The claimant's case is that he did not have ample time to prepare and attend as was scheduled because the time allowed was too short. Prior to receiving the invitation for the hearing, the claimant states that word had gone around amongst staff that he had been interdicted. As he left office on 20.06.2016, the claimant states that he discovered that his electronic door access card could not function as he had been deleted from the access system so that he had been locked out from the bank. It is his case that he was effectively terminated from employment on 20.06.2016 when he was locked out. He had not had a fair and reasonable chance to answer the allegations in the show cause letter and it is his case that he was unfairly terminated.

The letter of 20.06.2016 inviting the claimant to disciplinary hearing at noon introduced further allegations of failure to respond to the show cause letter within the deadline given; and reporting to work late or absenting himself from work without lawful cause.

The claimant further case is that he considered that the termination had been a unilateral decision by the Managing Director Sam Waweru to embarrass and humiliate the claimant. The claimant states that the Managing Director Frank Ileri had travelled to India at the material time. Further, on 20.06.2016 the Chairman of the Board advised the claimant to write to Board Members about his concerns and the claimant provided the required information in his email of 22.06.2016. Further by email of 25.06.2016 the claimant appealed as advised by the Chairman.

The claimant's case was that he had not received a letter of termination but he considered himself terminated effective 20.06.2016 because he did not receive his salary for June 2016 as well as the monthly remittances for his car. Further, the claimant has stated that he knew that the Board would meet on 19.07.2016 to endorse his termination.

The respondent filed the memorandum of reply on 25.11.2016 through Oraro & Company Advocates and Mr. Chacha Odera Advocate appearing in that regard. The respondent prayed that the claimant's suit be dismissed with costs.

The respondent admitted that it employed the claimant as pleaded for the claimant in paragraph 4 of the memorandum of claim. The respondent admitted that the claimant's employment was terminated but not on 20.06.2016 and on account of a lockout as alleged by the claimant. The respondent's case was that the termination was on 21.06.2016 by a letter of the same date. Further the respondent's case was that the claimant failed to reply to the show-cause notice and further failed to attend the disciplinary hearing. The respondent's further case was that the claimant had filed an administrative appeal in accordance with respondent's internal procedures as at the time of filing the suit and so that the suit was an abuse of Court process.

The Court has considered the pleadings, the evidence, and the submissions filed for the parties. The Court makes findings on the matters in dispute as follows.

**First** the Court returns that there was no dispute that the parties were in a contract of service.

**Second**, the Court returns that there was no dispute that the claimant's contract of service was terminated. The dispute in that regard was the effective date of the termination. The claimant says he was terminated on 20.06.2016 when he was denied access to the respondent's electronic access system and also locked out when his electronic access card failed to function. The respondent says the termination was effective 21.06.2016 when the letter of termination was served. The claimant stated that he received the termination letter in December 2016 after moving to Court and on 20.06.2016 staff had been informed that he had ceased to be an employee. The respondent's witness (RW) testified that the dismissal letter dated 21.06.2016 was delivered by email, courier to claimant's residence and by post and the claimant knew about the dismissal as per RW's paragraph 26 of the witness statement.

The Court returns that the material on record shows that indeed the termination letter of 21.06.2016 was delivered to the claimant and by that letter the claimant's employment was terminated. In the instant case, the Court returns there is the respondent's overt action in issuing the termination letter and by reason of the purported lock out on 20.06.2016 would not be relied upon to make a finding of constructive termination. The Court finds accordingly.

**Third**, the Court finds that the termination was unfair in procedure and substance. The Court finds that taking into account the magnitude of the allegations in the show-cause notice, the claimant was entitled to lament that the weekend allowed to reply was not sufficient. When Monday 20.06.2016 came, the invitation for hearing was made and the claimant was not given ample time to prepare and to attend. There was no room provided in the invitation for the claimant to attend with a colleague of his choice as per section 41 of the Employment Act, 2007. Further, the invitation introduced two fresh allegations and which the claimant had not been given a notice to show-cause. Thus, the Court returns that there was no due process involved as envisaged in section 45 of the Act. In absence of such due process, the Court returns that it cannot be said that as at the time of termination, the respondent had valid reasons to terminate as per section 43 of the Act. The Court holds that an employer should offer an employee a genuine chance by way of a notice and a hearing as per section 41 of the Act failing, it cannot be presumed that the employee is culpable of the allegations for which no such genuine opportunity was not provided. The termination was unfair in substance and procedure and the Court finds accordingly.

**Fourth**, the Court has considered the factors in section 49 of the Act. First the Court returns that the relationship between the claimant and his immediate supervisors had apparently collapsed in the circumstances of this case. Thus reinstatement will not be an appropriate remedy in the instant case because of strained practicability of the claimant's continued employment. The Court has considered the claimant's previous record of service that appears to have had complaints of lateness and absence without permission or lawful cause. The Court has considered that the claimant appealed against the dismissal and was invited for the appeal hearing on 19.07.2016. While saying that he did not attend appeal hearing because he had filed the present suit, the suit was in fact filed on 25.07.2016 long after the invitation. The Court finds that such were factors that show that the claimant significantly contributed to his dismissal though he had desired to continue in employment.

The Court has considered the claimant's unchallenged lamentations about the respondent's non-compliance with statutory and regulatory provisions as reported by him to the respondent's management leading to his predicament - and which factor aggravates the respondent's action to dismiss the claimant. To balance justice for the parties the claimant will be awarded 6 months' compensation under section 49 of the Employment Act, 2007 in compensation for unfair termination at Kshs. 1, 163, 696.00 per month making **Kshs.6, 982, 176.00**. The termination was unfair and without due notice and with 2 allegations for which no notice to show cause was given and the claimant is awarded one month pay in lieu of the termination notice per contract and section 35 of the Act making **Kshs. 1, 163, 696.00**. The evidence was that the claimant worked up to 21.06.2016 but he was not paid the days worked and he is paid prorata **Kshs. 814, 587.20**.

**Fifth**, the Court further makes findings as follows:

- a) There was no evidence that the claimant had exercised the option to join the employee share option scheme. No submissions were made to justify the prayer in that regard. The same will fail.
- b) As submitted for the respondent once the contract of service was terminated, in absence of reasonable justifications, the remuneration and other benefits under the contract lapsed. Thus the prayers for lost future earnings and other benefits will collapse as unjustified. The claimant did not show anything attributable to the dismissal by the respondent that diminished his alternative earning capacity and he confirmed in his evidence that he was involved in consultancy services. Further the claimant did not file evidence of employment opportunities offered and lost due to the dismissal decision. The claims and prayers for lost future earnings will therefore fail.
- c) No submissions were made to justify the prayer for bonus and the same will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs.8, 960, 459.20** (less due PAYE) by 01.07.2019 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 17<sup>th</sup> May, 2019.**

**BYRAM ONGAYA**

**JUDGE**