



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 297 OF 2016**

**BETWEEN**

**RONALD ODHIAMBO OWUOR.....CLAIMANT**

**VERSUS**

**TEA WAREHOUSES LIMITED.....RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Muturi Gakuo & Kibara, Advocates for the Respondent

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 13<sup>th</sup> April 2016. He states, he was employed by the Respondent's predecessor, Consolidated [MSA] Limited, as a Clerk, on 2<sup>nd</sup> January 1997. He was later moved to the Respondent, and promoted to the position of Shipping Manager. On 13<sup>th</sup> February 2016, the Respondent's Human Resource Manager circulated a letter to Respondent's Staff through the social media, alleging that the Claimant had resigned. He was locked out. He considered his contract to have been terminated. 17 days later however, the Claimant received a letter to show cause, why he should not be dismissed. He replied. He was not allowed to go on working. His last monthly gross pay is shown in the pay slip of January 2016 at Kshs. 262,626. He prays the Court to grant Judgment in his favour, on the following terms:-

- 3 months' salary in lieu of notice at Kshs. 540,000
- Pending leave of 14 days at Kshs. 147,000.
- Severance pay over a period of 8 years worked with Respondent's predecessor at 15 days' salary for each of the complete years of service, at Kshs. 720,000.
- Salary for 12 days worked in February 2016 at Kshs. 105,050.
- Compensation for unfair termination equivalent of 12 months' salary at Kshs. 2,160,000.
- Certificate of Service to issue.
- Costs and interest.

2. The Respondent filed its Statement of Response on 2<sup>nd</sup> June 2016. It is agreed that the Claimant was employed by Consolidated [MSA] Limited as a Clerk. He resigned as a Clerk on 23<sup>rd</sup> July 1998. He applied for short term employment later in 1999 and 2001. He was a student at Moi University and would be granted temporary employment during his long vacations. He was later employed by Consolidated, a sister company of the Respondent. He has always been an Employee of Consolidated, not the Respondent. He was aware that Directors of the two companies are the same, and did not lodge any claim for years allegedly worked for Consolidated. Such claims are in any event time-barred. The Claimant conceded on 12<sup>th</sup> February 2016 that he was a Founding Director and Shareholder, of Cargolog [EA] Limited, a clearing and forwarding company, in direct competition with Consolidated. He made an offer of employment to one Alice Olang', an Employee of the Respondent. When confronted with this issue of conflict of interest, the Claimant disappeared. He failed to tender resignation, compelling the Respondent to issue notice to show cause, why disciplinary action should not be taken against him. He was

involved in fraudulent activities, including misuse of Consolidated's custom bonds and port accounts. He diverted Respondent's business to his own. He does not merit the prayers sought.

3. The Claimant, and Respondent's Managing Director George Patrick Nesbitt, gave evidence on 9<sup>th</sup> July 2018. The Respondent subsequently applied to reopen proceedings, and asked for leave to introduce certain documents, which the Respondent explained, were left out during the hearing of 9<sup>th</sup> July 2018. The Court allowed the Application, and both the Claimant and Nesbitt, gave further evidence on 9<sup>th</sup> July 2019, closing the hearing.

4. Owuor's evidence is that he worked for the Respondent as Operations/ Shipping Manager, from March 2001. He was not issued a formal letter of employment. Before, he worked for Consolidated. The two companies share Directors. George Nesbitt moved the Claimant to the Respondent. The Claimant signed Respondent's Code of Conduct, exhibited by the Respondent, in 2001. He did not work for Consolidated hence. His salary was Kshs. 180,000 monthly.

5. On 12<sup>th</sup> February 2016, there was a circular alleging the Claimant had resigned. On 13<sup>th</sup> February 2016, he was denied access to the workplace. The Respondent manufactured the information about Claimant's resignation. It was only on 29<sup>th</sup> February 2016, that the Claimant received a letter asking him to show cause, why his contract should not be terminated. There was no disciplinary meeting on 12<sup>th</sup> February 2016. There was no notice of termination. The Claimant replied to the notice to show cause on 1<sup>st</sup> March 2016. He did not receive any further enquiry from the Respondent concerning the subject matter.

6. The Claimant bought shares in Cargolog Limited. The company deals with clearing and forwarding. The Claimant was not an Employee of Cargolog, until termination. He was 100% dedicated to the Respondent. Cargolog was in a totally different industry from the Respondent's. The Claimant was merely investing in Cargolog's shares. The Claimant did not resign. He did not at any one time write a letter of resignation.

7. Cross-examined, the Claimant told the Court he works with Cargolog. He is not the owner, but a Co-owner. The company was registered in 2011. The Claimant has been a Director since. Its core business is clearing and forwarding. The Claimant admitted he had earlier told the Court that he merely bought shares. He conceded he was a Founder Director of Cargolog.

8. He worked for consolidated between 1997 to 2001. He was a Clerk in clearing and forwarding. Consolidated exported tea. The Respondent dealt with tea-blending. The two companies worked under the same roof.

9. It is not true that the Claimant was confronted by Nesbitt on his dealings with Cargolog, and simply walked away. The Claimant did not double deal. He was not privy to clearing and forwarding information at Consolidated. There was a clause in the Code of Conduct, relating to conflict of interest. The Claimant did not divert business from the Respondent. He did not poach Employees of the Respondent, to work for Cargolog. He did not poach Alice Olang'. He did not resign. He had been employed by Consolidated temporarily, since he was in form 4. He had long association with the Respondent, since 1997. He received practical experience from the Respondent, and trained at KRA for 6 months. Nesbitt was aware since 2011, that the Claimant had incorporated Cargolog. He was aware the Claimant was a Director. Redirected, the Claimant told the Court that the show cause letter did not mention Consolidated. Nesbitt was aware about the Claimant's dealings with Cargolog. The alleged meeting between the Claimant and Nesbitt did not discuss conflict of interest. The Claimant was not allowed to transact normal business after February 2016.

10. Nesbitt explained that Consolidated services the businesses of the Respondent, by clearing and forwarding. The Claimant was first employed by Consolidated in 1997 as a Casual Employee. He joined the Respondent in 2001/ 2002, handling all clearing and forwarding for the Respondent, through Consolidated.

11. The Respondent did not terminate Claimant's contract. He was confronted with evidence of his involvement with Cargolog, a clearing and forwarding business. He tried to poach business from the Respondent. He diverted business to his outfit. He accepted his involvement with Cargolog. He approached Alice, Import Supervisor, to work with Cargolog. He even printed a business card for Alice in the name of Cargolog. Nesbitt was disappointed with the way the Claimant decided to leave. He always denied the existence of Cargolog.

12. Nesbitt admitted on cross-examination that the Claimant was an Employee of the Respondent. Consolidated Limited shares premises with Tea Warehouses Limited. Nesbitt had an operations meeting on 12<sup>th</sup> February 2016. He met with the Claimant after the meeting. There are no minutes of the meeting. Nesbitt did not know if the Claimant was a Director of Cargolog in 2014. The Respondent does not do clearing and forwarding. The Claimant founded his Company based on knowledge and experience gained from the Respondent and its sister company. The Respondent issued notice to show cause to the Claimant. The notice did not say that the Claimant absconded. Redirected, Nesbitt told the Court that the sister companies worked under the same roof. The Claimant did not give satisfactory answer to the notice to show cause. If he had done so, the Respondent would have determined what disciplinary measures to take.

#### **The Court Finds:-**

13. There are 2 associated companies- Consolidated [MSA] Limited and Tea Warehouses Limited, the Respondent herein. The first company is involved in clearing and forwarding, the second in blending and exporting tea. Evidence from common Director George Nesbitt, indicates the first company clears and forwards products for the second company. The companies share premises.

14. The Claimant was at different points employed by the companies. There is written evidence that the Claimant worked with Consolidated as a clerk, from as early as 1998. He testified he was employed in 1997. There are letters exchanged between the Parties to show that the Claimant worked as a clerk on temporary basis. He resigned through a letter dated 23<sup>rd</sup> July 1998, to enable him pursue studies at Moi University. He would, while at Moi University, return to Consolidated where he was given holiday jobs.

15. On 12<sup>th</sup> March 2001, he appears to have finished studying and was offered a contract of employment. He was appointed Assistant Supervisor effective 1<sup>st</sup> March 2001. His salary was Kshs. 16,000 monthly. Subsequently his salary was increased, through correspondence issued in the name of Consolidated.

16. There is evidence that the Claimant signed a Code of Conduct on 2<sup>nd</sup> December 2004. The Code indicates the Respondent was Claimant's Employer at the time. He must have been moved to the Respondent between 2001 and 2004. A Memo issued by George Nesbitt dated 10<sup>th</sup> June 2005, determinatively shows that the Claimant was appointed Respondent's Shipping Manager, effective 20<sup>th</sup> June 2005.

17. The Claimant held this position until 12<sup>th</sup> February 2016, when the Respondent circulated an email to its Staff, alleging the Claimant had resigned. His last salary as shown in the pay slip of January 2016 was basic salary at Kshs. 180,196, fuel allowance at Kshs. 80,930, and airtime allowance at Kshs. 1,500 – amounting to a gross monthly salary of Kshs. 262,626.

18. In issue is whether the Claimant's contract was terminated by the Respondent at all, or unfairly; whether he is entitled to compensation for unfair termination; and whether he merits terminal dues as pleaded, together with costs and interest.

19. The Claimant registered a company called Cargolog Limited on 15<sup>th</sup> July 2011. He did not merely invest by buying shares in an existing company, as initially told to the Court by the Claimant. He founded a company whose business was clearing and forwarding, the line of business pursued by Consolidated. He had worked for Consolidated from his formative years, gained knowledge and experience, then set up a rival business.

20. He then sought to take business and staff from the Respondent. He asked Alice, a Supervisor with the Respondent, to quit the Respondent and work for Cargolog. He printed for her a business card, in the name of Cargolog.

21. He was still in active employment with the Respondent. He did not disclose to the Respondent that he had registered a business to rival that of the Respondent.

22. He was bound by the Code of Conduct not to engage in unethical behaviour. His original contract demanded he observes secrecy and confidentiality. The Code specifically prohibited the Claimant from engaging in other business in competition with that of the Respondent; he was not to work as an Employee, Contractor, Consultant, Agent or Director of other companies; and was in general, not allowed to have divided loyalties.

23. The Claimant's registration, directorship and operation of Cargolog, was in direct competition with the business operated by his Employer, the Respondent herein, and clearly, the Claimant had a conflict of interest. He violated the Code and the Contract. He was in fundamental breach of his terms and conditions of employment. There was valid reason shown, which would have justified termination of his contract.

24. The Respondent however did not react to Claimant's breach, in accordance with the dictates of fair procedure, prescribed under Section 41 and 45 of the Employment Act.

25. Instead of issuing the Claimant a notice to show cause why, he should not be sanctioned, the Respondent seems to have attempted to prevail upon the Claimant to resign. When he did not give in, the Respondent then circulated fake news to staff, via email, alleging that the Claimant had tendered his resignation. Parties in their evidence before this Court agree that the Claimant did not tender his resignation. The fake letter issued on 12<sup>th</sup> February 2016, the same date the Claimant is said to have met George Nesbitt.

26. That meeting does not appear to have met the standards of a disciplinary hearing. It was just between the Claimant and Nesbitt. There is no agenda of the meeting shown through minutes. There was no notice issued to the Claimant, laying out the charges, and advising him on his procedural rights, under Section 41 of the Employment Act. There was no hearing. Nesbitt told the Court that the Claimant was confronted with the facts concerning his dealings with Cargolog. He disappeared after this confrontation.

27. The Court notes that the Respondent issued the Claimant a notice to show cause on 29<sup>th</sup> February 2016, about a fortnight after the Claimant allegedly resigned, or deserted. The Claimant replied on 1<sup>st</sup> March 2016. He was not called to a disciplinary hearing. There was no letter of termination issued.

28. The Court's view is that while the Respondent has shown there was valid reason to justify termination of the contract, the Respondent botched fair procedure, first by alleging that the Claimant resigned, second by advancing the argument that he deserted, and lastly by not giving him a hearing at all – either an account of conflict or interest or desertion. To this extent, termination was unfair, and the Claimant merits compensation, under Section 49 of the Employment Act.

29. His gross monthly salary was Kshs. 262,626. He had worked from 1997 as a temporary Employee, and apprentice, until 2016 when he left in the high position of Shipping and Operations Manager. His record, until he opted to compete with his longtime Employer, was without blemish. He perhaps did not expect to go on working for the Respondent for long, having opted to compete against his Employer. He definitely contributed, in no small measure, to the circumstances leading to his exit from the Respondent. It is unethical for an Employee to place himself in direct competition with his Employer's business. Termination was based on valid reason, but flawed in the manner of its execution. ***The Claimant is granted equivalent of 2 months' gross salary in compensation for unfair termination, at Kshs. 525,252.***

30. The Respondent as stated above, had valid reason in terminating the Claimant's contract, which would have justified summary dismissal. Notice or notice pay was therefore, not merited.

31. There was no clear evidence on the prayer for pro-rata leave of 14 days. There is similarly no evidence that the Claimant's position was declared redundant by Consolidated Limited after working for 8 years. He was in temporary employment in the early years, and joined the Respondent in continuous service, the 2 companies being in complementary business, with the same Directors, and operating under the same roof. These prayers are rejected.

32. Having last worked on 12<sup>th</sup> February 2016, the Claimant ought to have been paid salary for 12 days worked. **He is allowed the prayer for salary of 12 days, at Kshs. 121,212.**

33. **Certificate of Service to issue.**

34. **No order of the costs.**

35. **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED: -

**a. Termination was based on valid ground but procedurally unfair.**

**b. The Respondent shall pay to the Claimant equivalent of 2 months' gross salary at Kshs. 525,252 and salary for 12 days worked in February 2016, at Kshs. 121,212 – total Kshs. 646,464.**

**c. Certificate of Service to issue.**

**d. No order on the costs.**

**e. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

**Dated and delivered at Mombasa this 11<sup>th</sup> day of October 2019**

**James Rika**

**Judge**