



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1078 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**LAWRENCE LIEN SHOONA.....CLAIMANT**

*VERSUS*

**EAST AFRICA PORTLAND**

**CEMENT COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant Lawrence Lien Shoona was employed by the respondent in July 2000 as Regional Sales Representative within the respondent's sales and marketing department.

The applicant's career progression over the years has been as follows: -

- i. Field Sales Representative – 1<sup>st</sup> July 2000 to 15<sup>th</sup> January 2002
- ii. Regional Sales Representative (Nyanza/Eastern/North Eastern/Rift Valley) – 16<sup>th</sup> July 2002 to 31<sup>st</sup> March 2007;
- iii. Regional Sales Executive – 1<sup>st</sup> April 2007 to 31<sup>st</sup> May 2009
- iv. Business Development Manager – 1<sup>st</sup> June 2009 to 30<sup>th</sup> June 2014
- v. Strategy and Corporate Communication manager – 16<sup>th</sup> November 2015 to 29<sup>th</sup> September 2016
- vi. Quarry Operations Manager – 30<sup>th</sup> September 2016 to present

On or about October 2016 the respondent contracted Ernst and Young Auditors to carry out a forensic audit of its operations and affairs. The terms of reference for the forensic audit were focused on the following specific areas; working capital, cash flow deterioration, company discounts (rebates), inventory management, credit facilities, creditors, debtors, invasion of land, land exploration and company depots. Upon conclusion of the audit, the auditors prepared a report which was tabled and adopted by the respondent's board at its meeting held on 11<sup>th</sup> May 2017. It is alleged by the respondent that the forensic report made some incriminating findings about the claimant based on which the respondent's board resolved to issue a notice to show cause to the claimant on 11<sup>th</sup> May 2017. The charges against the claimant according to the notice to show cause are as follows –

1. Collusion to defraud the company of funds thereby leading to unwarranted losses;
2. Involvement severally or jointly within the Corporate Affairs team or elsewhere within the company in initiating and executing a fraudulent and irregular transaction with the Kreative Concepts Limited
3. Acting un-procedurally and outside or without clearly defined measures that stipulate how Corporate Social Responsibility (CSR) activities were funded and whether any such CSR activities yielded any value for the company.

The show cause letter required the claimant to show cause within 7 days why he should not be summarily dismissed from service on grounds

of misconduct based on the charges. The notice to show cause letter also advised the claimant that he was suspended from his official duties pending determination of the matter and that during suspension the provisions of the obtaining company policy will apply. He was further advised in the letter to keep away from the company premises unless otherwise indicated by the company.

By letter dated 15<sup>th</sup> May 2017 the claimant informed the respondent that he was unable to respond to the allegations in the show cause letter as they were general in nature and without supporting documents. He requested to be supplied with the following documents to enable him respond substantively to the show cause notice –

The full forensic audit report or an extract that adversely mentioned him as stated in the notice to show cause letter;

Minutes of the Board of Directors meeting held on 11<sup>th</sup> Mays 2017 and;

The Company's Human Resources Policy Manual.

The claimant further requested for extension of the period for responding to the show cause notice by 7 days from the date of receipt of the documents he had requested to be supplied with.

On 18<sup>th</sup> May 2017 he wrote another letter to the respondent denying the charges against him, which he termed as unsubstantiated, generalised, baseless, malicious and unfounded. He again requested for a copy of the forensic audit report to enable him respond to the allegations against him substantively.

Again on 25<sup>th</sup> May 2017 the claimant wrote another letter requesting the respondent to supply the documents requested in his letter dated 15<sup>th</sup> May 2017.

The respondent however did not supply the documents to the claimant. He filed this claim thereafter on 17<sup>th</sup> June 2017.

In the claim he seeks the following remedies –

- a. A declaration that the respondent's decision to indefinitely suspend the claimant is in breach of the claimant's right to a fair administrative actions as enshrined under Article 47 of the Constitution of Kenya 2010.
- b. A declaration that the respondent's decision to indefinitely suspend the claimant is unlawful and/or unfair and in gross contravention of the claimant's constitutional right to fair labour practices.
- c. A declaration that the respondent's decision to indefinitely suspend the claimant is in contravention of the respondent's internal disciplinary procedures and particularly Clause 12.10 of the respondent's Human Resource Policy Manual.
- d. An order be and is hereby issued lifting the claimant's suspension and directing the immediate and unconditional reinstatement of the claimant to his position with full benefits.
- e. An order be and is hereby issued for payment of claimant's withheld salary, allowances and benefits during the period of suspension forthwith.
- f. Costs of this suit.
- g. Any further or and/or other relief(s) that this court may deem fit and just to grant in the interests of justice.

Together with the memorandum of claim, the claimant filed an application by way of notice of motion under certificate of urgency seeking the following prayers –

1. That the application be certified urgent and the same be heard *ex-parte* in the first instance and service of the same be dispensed with.
2. That pending the hearing and determination of this applicant *inter partes*, an order be issued lifting the applicant's suspension and reinstating him to his position with full benefits including back salary.
3. That pending the hearing and determination of the claim filed herein *inter partes*, an order be and is hereby issued lifting the applicant's suspension and reinstating him to his position with full benefits including back salary.
4. That the court do make any such and/or further orders and issue any other relief(s) as it may deem fit and just to grant in the circumstances and in the interest of justice.
5. That the costs of this application be provided for.

The respondent filed a replying affidavit of JANEROSE KARANJA, its Head of Human Resources sworn on 6<sup>th</sup> December 2017, which was deemed to be its response to both the claim and application.

The parties agreed to dispose off the suit by way of written submissions. They subsequently filed and exchanged written submissions.

### **Claimant's Case**

It is the claimant's case that his suspension was illegal, unlawful and in contravention of the respondent's Human Resource Policy Manual and infringed on his labour rights. It is further the claimant's case that although an employer has a right to suspend an employee as was held by the court in **Mary Chemweno Kiptui -V- Kenya Pipeline Company Limited [2014] eKLR** the same must comply with its disciplinary procedure as was held in the case of **Simon Otieno Mboga -V- Kenya Forest Service [2015]**. It is also the claimant's case that his suspension was unwarranted as the respondent has not demonstrated that he posed a risk to the running of the respondent's business, relying on the decision in **Mary Chemweno Kiptui (supra)** where the court stated that suspension should be resorted to by an employer where on reasonable grounds, the employer suspects an employee to have been involved in misconduct and it is desirable to remove the employee from the place of work and carry out investigations in the absence of the employee. It is submitted that the respondent further failed to avail a copy of the forensic audit report that is alleged to have incriminated the claimant but was required to respond within 7 days. It is submitted that the one page extract of the forensic audit report exhibited as exhibit JK 7 of the respondent's replying affidavit cannot be relied on as evidentiary proof as it does not have signatures of the makers. It is submitted that the averments that the forensic audit report recommended disciplinary proceedings against the claimant are unsubstantiated and that the respondent is guilty of non-disclosure.

It is submitted that failure to properly explain the reason and justification for the suspension to the claimant coupled with the failure to supply him with a copy of the forensic report amounted to procedural unfairness as was held in **Fredrick Saundu Amolo -V- Principal Namanya Mixed Day Secondary School and 2 Others** where the court held that the purpose of removal of an employee temporarily from a workplace must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee defend himself in a meaningful way.

It is submitted that the wording of the notice to show cause to the effect that the claimant was to be on suspension "*pending determination of the matter*" was in contravention of Clause 12.10 of the respondent's Human Resource Policy Manual. It is submitted that the claimant subsequently responded to the show cause letter vide his letter of 18<sup>th</sup> May 2017 but was never served with a letter accepting his explanations or inviting him to the disciplinary hearing.

It is further submitted that the suspension contemplated under Clause 12.10 of the respondent's Human Resource Policy Manual was for purposes of investigations while in the present case the investigations were completed through the forensic audit which was conclusively adopted by the respondent's Board of Directors.

The claimant further submits that the charges framed against him are ambiguous and general and he was not able to respond to the same without the benefit of the forensic audit report.

It is submitted that the letter dated 20<sup>th</sup> November 2017 annexed to the replying affidavit as "exhibit JK 10" extended the claimant's suspension beyond the 60 days contemplated in the respondent's manual without reliance on an express provision of the manual, is illegal and amounts to punishing the claimant without due process. The claimant relied on the case of **Joseph Ndungu -V- Mastermind Tobacco (K) Limited**. It is further submitted that payment of half of claimant's salary during suspension as deposed at paragraph 33 and 34 of the replying affidavit is illegal, relying on the decision in the case of **Thomas Sila Nzivo -V- Bamburi Cement Limited**, that Section 19 of the Employment Act sets out the instances when an employer is allowed to withhold or deduct an employee's salary and the respondent acted illegally in withholding the claimant's salary.

The claimant further submits that his suspension is actuated by malice. He cited his demotion by the Managing Director from the position of Business Development and Delivery Manager to Quarry Operations Manager, a job he avers was not related to his academic, professional experience and skills. He also cites the text message from the Managing Director on 10<sup>th</sup> October 2016 at 22.06 p.m. threatening and intimidating him while citing rumours that the claimant was plotting with politicians to remove him from his position. He relied on the case of **Rebeca Ann Maina and 2 Others -V- Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the court stated that where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage-managed toward their dismissal the court will intervene not to stop the process altogether but to put things right.

The claimant prays that judgment be entered in his favour as prayed in the claim.

### **Respondent's Case**

The respondent's case is that the only prayer in the application pending for determination is prayer 3 as prayers 1 and 2 are spent, that likewise the only pending prayer in the claim is prayer (d) as prayers (a), (b), (c) and (e) are wholly dependent on the findings in prayer (d).

It is the respondent's case that the prayers sought by the claimant are not in congruence with the body of the application and the main suit as the application impugns placing the claimant on suspension while the claim impugns both the placing of the claimant on suspension and the process undertaken.

According to the respondent these are two separate and distinct processes. It is the respondent's position that in sum what the claimant has prayed for in this suit is the lifting of the suspension and not the nullification of the process undertaken after the suspension. It submits that the court can only grant the application if it finds that the process leading to the suspension was unfair and illegal as courts can only grant what has been prayed for. It is thus the respondent's submission that the issue before the court for determination is whether the suspension should be lifted and the disciplinary process put to a halt.

It is the respondent's submissions that contrary to the leave granted to the claimant to file a supplementary affidavit to respond to new issues raised in the replying affidavit, the claimant has in paragraphs 38 to 46 of the further affidavit raised new issues of fact which had not been

addressed in his supporting affidavit or in the replying affidavit and that these new facts are the subject of paragraph 41 of the claimant's submissions. The respondent prays that paragraph 38 to 46 of the claimant's further affidavit and paragraph 41 of the submissions be struck out. The respondent relies on the case of **Benjamin Ogunjo Andama -V- Benjamin Andola Andayi and 2 Others [2013] eKLR**.

It is the respondent's submission that disciplinary process falls within the exclusive purview of an employer's prerogative and the courts will intervene only in exceptional circumstances. The respondent relies extensively on the book titled "*Employment Law, Guide for Employees*" authored by George Ogembo in which he quotes the case of **Professor Gitile Naituli -V- University Council Multimedia University College and Another**.

The respondent further relied on the case of **Peter Mbutia Gitau -V- Kenya Revenue Authority [2015] eKLR** in which the court stated that the courts have no authority to question or revise management policies. The respondent submitted that the court can only interfere with the initiation and maintenance of the disciplinary process under exceptional circumstances.

The respondent submitted that the disciplinary process of the claimant was initiated and carried out in accordance with the applicable human resource regulations, Employment Act and principles of natural justice. It is further the respondent's submissions that there existed prima facie reason to believe that the employee conducted serious misconduct. The respondent relied on the case of **Joseph M. Kivilu -V- Kenya National Examinations Council [2016] eKLR**.

It is submitted that during the course of the forensic audit the claimant together with other employees were interviewed and after the audit the claimant was found to be possibly culpable as deposed at paragraph 24 of the replying affidavit. It is submitted that these are grave offences that necessitated suspension of the claimant and that this conclusion of the employer cannot and should not be questioned by the court as it is a prerogative of the employer.

On the issue of half salary during suspension the respondent relied on the case of **Peter Mbutia Gitau (supra)** where the court held that if the respondent's code of regulations provide for suspension on half salary the court cannot order the contrary. On the duration of the suspension the respondent submitted that the claimant rushed to court prematurely before the duration of the suspension lapsed.

On the claimant's contention that the respondent failed to avail to him the audit report, the respondent submitted that this did not prejudice the claimant's position as he responded to the notice to show cause. It is further contended that the claimant was taken through a pre-suspension hearing by Ernst and Young.

## **Determination**

I have considered the pleadings and submissions. The issues that arise for determination in my considered opinion are the following –

1. The law on suspension.
2. Whether there was valid reason for suspension of the claimant.
3. Whether the respondent complied with the procedure.
4. Whether the failure to supply the forensic report to the claimant was prejudicial to him
5. Whether the claimant is entitled to the prayer sought.

### **1. The law on suspension**

The law relating to suspension is provided for in the Employment Act indirectly under Section 12 of the Employment Act. Section 12 requires an employer with 50 or more employees to have in place disciplinary rules. The section provides as follows –

### **12. Statement on Disciplinary Rules**

#### **1. A statement under section 10 shall -**

- a. specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;**
- b. specify the person to whom the employee may apply?**
  - i. if dissatisfied with any disciplinary decision relating to the employee; and**
  - ii. for the purpose of seeking redress of any grievance relating to his employment. and the manner in which an application shall be made; and**
- c. where there are further steps to be taken consequent to any such application, the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.**

**2. Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.**

**3. This section shall not apply whereas at the date the employee starts work the employer has employed less than fifty employees**

As was held in the case of **Timon Otieno Moga (supra)** “issues such as interdiction and suspension ought to be provided for in the statement of disciplinary rules.” In the present case the disciplinary rules of the respondent provide at Clause 12.10 as follows –  
“12.10 Suspension

*Suspension is where an employee is forbidden from performing or attending to official duties pertaining to his/her office and no salary is payable during the suspension period. However the employer has the discretion to continue paying other benefits such as medical, education for dependants and housing allowance to the employee.*

*Suspension from duty shall be invoked in serious misconduct disciplinary cases which are criminal in nature. Such disciplinary cases require further investigation and at times, employees may have been arrested, arraigned in court and their cases are awaiting determination by a court of law.*

*Where the company has probative and sufficient evidence incriminating an employee under suspension, it need not wait for the outcome or determination of the case by the court but may enforce separation on employer-employee relationship and the parties contractual relations.*

*However where the company opts to wait for the outcome of the criminal case and subsequently the employee is acquitted not on appeal, the company shall have no other option except reinstatement of the employee with restoration of all benefits. In the event that the employee is convicted by a court of law, this will form basis for the parties’ separation and this separation will be effective from the date of suspension.*

*Unless where the company has opted to await the outcome of court proceedings against an employee all suspension cases should be concluded within a maximum of 60 days from the date of suspension.”*

This was therefore the basis of the claimant’s suspension.

The law is also settled on the right of an employer to carry out disciplinary action against its employees as was stated in the case of **Professor Gitile Naituli -V- University Council Multimedia University College & Another**

*“The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”*

This was reiterated in the case of **Alfred Nyungu Kimungu -v- Bomas of Kenya** where the court stated –

*“The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.”*

However as stated in the case of **Rebeca Ann Miana & 2 Others -v- Jomo Kenyatta University of Agriculture and Technology**, the courts will intervene if the process is marred with irregularity or the employee legitimately fears that the process is stage managed with the intention of removing him from office.

This leads to the second issues for determination which is –

## **2. Whether there was valid reason for suspension of the claimant**

In the letter of suspension the claimant is charged with the following charges

- i. Collusion to defraud the company of funds thereby leading to unwarranted losses;
- ii. Involvement severally or jointly within the Corporate Affairs team or elsewhere within the company in initiating and executing a fraudulent and irregular transaction with the Kreative Concepts Limited
- iii. Acting un-procedurally and outside or without clearly defined measures that stipulate how Corporate Social Responsibility (CSR) activities were funded and whether any such CSR activities yielded any value for the company.

The extract of the forensic audit report which according to the respondent is the basis of the suspension of the claimant is reproduced below –

Name of Employee	Lawrence Shoona
Current Position of EAPCC	Quarry Operations Manager
Previous Position of EAPCC	Business Development Manager and Head of Corporate Affairs

Area of Focus	Key Finding and observation
Procurement and Engagement of Kreativ Concepts	KES 1.9 M was paid without an LPO and the amounts were debited to Mr. Shoona’s staff account. Mr. Shoona was the originator of this transaction and there is no support for works done.  In an interview, Mr. Shoona indicated that the accounts were paid by Mr. Samuel Ngunjiri and Mr. Joseph Karosei. Supporting documentation for payment of the amount for services offered (except the supplier invoice) were not availed.
Corporate Social Responsibility	Unsupported CSR expenditure amounting to KES 9.5 M for construction of a dormitory at a school in Loita (former Board Chairman’s village). This was the highest single CSR expenditure in the 6 years under scope. The expenditure was approved by Mr. Lawrence Shoona and the former Managing Director, Mr. Tande. There was no supporting documentation to show that work was actually done.
Precast Plant	EAPCC Board approved a board paper dated 13 September 2012 in relation to the Precast Plant which was based on an inaccurate market survey of the market survey was provided by Mr. Lawrence Shoona. However Mr. Shoona in his interview indicated that the market survey had been conducted in the year 2009 when the estimated installed capacity for Bamburi which was used as a baseline was 6,000 units per 8 hour shift.”

My reading of the extract of the report does not correspond with the charges against the claimant. Furthermore the letter of suspension states that –

*“The recommendations contained in the forensic audit, taking into account your response to the aforementioned matters were adopted by the Board of Directors on 11<sup>th</sup> May 2017.*

*The issues raised in the audit have had a negative impact on the financial performance and operations of the EAPCC for the period covered by the forensic audit and your role has demonstrated a clear breach of your employment obligations amounting to gross misconduct.”*

The extract does not contain recommendations for disciplinary action against the claimant. The extract does not indict the claimant. The extract only refers to certain documents or information not having been shown to the auditors by the claimant during the audit interview.

This is contrary to the provisions for suspension under the respondent’s Human Resources Policy Manual which provide for suspension only in cases which are criminal in nature “““@’...where the company has probative and sufficient evidence incriminating an employee...”

The extract of the audit report does not amount to “probative and sufficient evidence incriminating” the claimant that are criminal in nature. All that is stated in the extract is that supporting documents were not shown to the auditors.

### **3. Whether the respondent complied with the procedure**

The procedure for suspension is provided in clause 12.10 of the respondent’s Human Resource Manual as already set out above. It provides that suspension is invoked in case of serious misconduct which are criminal in nature where further investigations are necessary and where there may be criminal cases pending against the employee.

In my opinion the issues raised in the extract of the forensic audit report do not disclose any misconduct that is criminal in nature. All that the report complained about against the claimant is lack of supporting documents in the first two cases while the last extract relating to market survey does not implicate him at all and only required clarification whether what the claimant told the auditors was correct.

For these reason I find that the respondent has not proved that the suspension was warranted at all. I agree with the claimant that there must have been some malice and premeditated intention to use the audit to remove the claimant from employment.

### **4. Whether the failure to supply the forensic report to the claimant was prejudicial to him**

The respondent has admitted not supplying the claimant with a copy of the forensic audit report as well as all other documents and particulars

he sought to enable him respond to the show cause letter.

As is evident from the notice to show cause, the charges are framed in a general manner and the claimant required the report to ascertain what the exact complaints and recommendations against him were and therefore effectively responded to the same.

The respondent's averment that the claimant was interviewed by the auditors and in any event responded to the charges is to say the least absurd. The claimant was not on suspension when he was interviewed by the auditors. He was not informed he was being interviewed for purposes of discipline. He was only giving information to the auditors in his capacity as a Manager.

Having been suspended from service, he had no access to documents to enable him respond to the charges against him which as I have pointed out were general in nature. I find that the respondent's refusal to supply copy of the audit report and other particulars sought by the claimant to enable him respond to the notice to show cause was prejudicial to him and made it extremely difficult for him to respond to the charges raised in the notice to show cause.

It is not lost to the court that the report has not been produced in court to enable the court confirm if the extract by the respondent is correct or if the respondent's interpretation leading to the charges against the claimant is accurate. The only interpretation the court make is that the respondent had information it wished to keep away from the claimant and the court.

#### **5. Whether the claimant is entitled to the prayers sought**

The claimant prayed for a declaration that his indefinite suspension was a breach of his right to fair administrative action enshrined in the constitution and gross contravention of his right to fair labour practice as well as a contravention of the internal disciplinary procedures especially Clause 12.10 of the Human Resource Policy Manual.

I have always held that fair administrative action belongs to the realms of public law and has no place in private employment law unless the employment has a constitutional underpinning. I therefore do not agree with the claimant that his rights to fair administrative action was infringed upon by the suspension.

I however agree with the claimant that this rights to fair labour practices under Article 41 was violated by his suspension on the following grounds: first there was no valid reason for suspension. Secondly, he was denied a copy of the forensic audit report that the suspension was anchored on and thirdly the letter of suspension did not specify the period within which the claimant was expected to be on suspension.

I accordingly declare the suspension a contravention of Article 41 of the constitution and Clause 12.10 of the respondent's Human Resource Policy Manual.

#### **Remedies**

Having found the suspension irregular, I accordingly lift the suspension and order the unconditional reinstatement of the claimant to his position with full benefits withheld during suspension. The reinstatement however does not stop the respondent from requiring the claimant to substantively respond to the notice to show cause after being supplied with all the documents he requested in his letter dated 15<sup>th</sup>, 18<sup>th</sup> and 25<sup>th</sup> May 2017 . As I have already pointed out, he does not need to be on suspension to respond to the notice to show cause.

I also wish to caution the claimant on the manner in which he relates to his superiors especially the Managing Director. He must respect authority and relate to his superiors in a respectful manner even if he has misgiving about how he has been handled.

I further wish to state here that I agree with the respondent that paragraphs 38 to 46 of the claimant's further affidavit and paragraph 41 of the claimant's submissions raise new issues that did not feature in the claim or replying affidavit and are expunged from the record. The same have not been considered in making the final determination in this case.

The claimant having been successful in his claim, the respondent shall pay claimant's costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF MAY 2018**

**MAUREEN ONYANGO**

**JUDGE**