



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2283 OF 2014

THEURI MUNYI.....CLAIMANT

VERSUS

GNLD INTERNATIONAL (Pty) LIMITED.....1ST RESPONDENT

GNLD INTERNATIONAL LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 19.12.2014 through Muthaura Mugambi & Njonjo Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment by the respondents was wrongful, unfair and unlawful.
- b) The claimant be reinstated in his employment with the 1st respondent in the capacity of Vice President of Operations, East Africa without loss of employment benefits, seniority or service.
- c) All salaries and allowances or bonuses which the claimant has lost as a result of the unfair termination should be paid back to him in full from the date of dismissal to the date of the judgment.
- d) Damages in the sum of Kshs. 6, 600, 000.00 for unfair and unlawful termination of the claimant's employment equivalent to 12 months' gross salaries of the claimant at Kshs. 550, 000.00 per month.
- e) Severance pay for each completed year of service amounting to Kshs. 825, 000.00.
- f) Salary for the month of suspension amounting to Kshs. 550,000.00 (**but dropped**).
- g) One month salary in lieu of notice Kshs. 550, 000.00(**but dropped**).
- h) House allowance at the rate of 12% of the gross pay totalling to Kshs. 2, 376, 000.00 for the period of employment April 2009 to April 2012.
- i) Unpaid leave days for 21 days (**but dropped**).
- j) Interest on items (c), (d), (e), (f), (g), (h) and (i) above at Court rates of 12% per annum from 30th April 2012 until payment in full.
- k) Costs of the suit.
- l) Certificate of service.

At the hearing on 28.06.2018 it was ordered, "**By consent prayers (f), (g), and (i) and interest per (j) on the items dropped.**"

The statement of response was filed on 12.03.2015 through Hamilton Harrison & Mathews (incorporating Oraro & Co.) Advocates. The respondents prayed that the claim herein be dismissed with costs.

The 2nd respondent is incorporated under the Companies Act, Cap 486 of the Laws of Kenya and carries out business in Kenya and internationally. The 1st respondent is a company incorporated under the laws of the Republic of South Africa. The respondents are jointly sued because the 1st respondent issued the claimant's letter of employment and issued subsequent claimant's letters of promotion; and the 2nd respondent paid the claimant's salary, undertook the claimant through the disciplinary process, and issued the termination letter subject of the present proceedings.

By the letter dated 24.04.2009 signed by Marco Taylor, Vice President of Operations, GNLD Africa the claimant was offered employment to by GNLD International (Pty) Ltd East Africa to the position of Director of Operations for GNLD East Africa with a 4 months probation period earning taxable Kshs. 425, 000.00 and after successful probationary service increasing to taxable Kshs. 450, 000.00. Other benefits included provident fund, annual leave, medical aid, products of research, annual bonus being non-guaranteed bonus normally paid in December of each year based on the company's performance, and annual review and on agreement his next review to be in January 2010. The claimant accepted the offer by signing on 24.04.2009 and to start working on 01.05.2009. The claimant signed the letter of appointment on 24.04.2009.

By the letter dated 20.07.2011 the 1st claimant informed the claimant that he had been confirmed in the position of Vice President of Operations East Africa and his salary was increased to Kshs. 500, 000.00 per month effective 01.07.2011. By the letter dated 01.01.2012 the claimant was advised that as from 01.01.2012 his salary was increased from Kshs. 500,000.00 to Kshs. 550,000.00 per month being a 10% increase in salary. The increase was subject to revision each year and his next review would be in January 2013. The letter further stated:

- Quarterly Sales Volume Bonus: Based on Sales Performance of East Africa (SVB=Level 1).
- Profit Bonus: Based on the profit of East Africa (2% of LOH).

The claimant received the letter dated 13.04.2012 on same date. The letter conveyed that the employer was considering terminating the claimant's employment on grounds relating to his conduct, capacity and compatibility in his role as a Vice President of Operations East Africa. The particulars of the allegations were set out in detail. The letter conveyed that the claimant was required to attend a disciplinary hearing on Thursday 19.04.2012 at 10.00 in the Kenya Distributor Centre for the claimant to make his representations in view of the allegations levelled against him in the letter. He was entitled to attend with a representative of his choice from within the Company. He was informed that he could bring witnesses and that he could cross-examine witnesses. If he needed an interpreter, the letter stated that one would be available. Further if he failed to attend the disciplinary inquiry, **"...may be held, and a sanction imposed, in your absence."** The letter concluded that Mr. Marco Taylor, Vice President GNLD Africa, would chair the hearing. In the meantime the claimant was to proceed on leave pending the conclusion of the process. The letter conveyed that the claimant was not permitted to contact any of the company's customers or suppliers and would have no access to the company's premises and property. If the claimant had any queries he was advised to contact one Veronica Locke.

The claimant wrote his detailed reply to the allegations by his letter dated 17.04.2012 addressed to the Chairman of the disciplinary hearing.

The disciplinary hearing took place on 19.04.2012 as was scheduled and chaired by Marco Taylor, the 1st respondent's Vice President.

The claimant's further account is as follows. On the morning of the disciplinary hearing on 19.04.2012 the claimant was asked to have a brief meeting at the offices of the respondents' advocates in Kenya being Hamilton Harrison & Mathews Advocates. The claimant attended at the advocates' boardroom and present were David Thomas, Marcos Taylor, The Human Resource Manager for Kenya one Fred Kisia, and Ms. Michi Kirimi, a partner at the said firm of advocates. The claimant was present with his witness one David Nyaga. The claimant's testimony is that at the meeting he was asked to resign from his position so as to avoid the embarrassment of going through the disciplinary process because he was a senior member of staff. The claimant declined to resign because he felt that he had done nothing wrong to warrant disciplinary action, leave alone resignation. After he declined to resign he was taken to the 1st respondent's offices on the 2nd floor of the ICEA Building in Nairobi (where the advocates were also housed at 4th Floor). The disciplinary hearing then took place. The claimant's case is that the disciplinary hearing was unfair because it came immediately after the request to resign at a meeting the chairman of the disciplinary hearing had attended and that there was a predetermined decision to get him dismissed.

The findings of the disciplinary hearing were conveyed in the letter dated 21.04.2012 addressed to the claimant by the chairman Marco Taylor. The record shows that the claimant was found guilty of some of the preferred allegations as follows:

1) The claimant was found guilty of charge 2 (improper and misuse of Company's money) in that he paid the contractor responsible for building the warehouse in Uganda without following the agreed stipulations in the signed contract between GNLD and the contractor signed on the 10.10.2011. Whilst the contract provided for percentage of completion payments, the claimant made payment to the contractor when the conditions had not been met. Further, the claimant failed to follow the correct procedure when finalising the quote for the Uganda Warehouse in that he asked the Kenyan contractor to reduce his quote to a similar level as that submitted by the other contractors and thereafter accepting its bid. There was no indication that the other contractors were requested to review their quotations. The claimant's action was therefore contrary to the company's policies which required fair treatment to all parties the company is involved with. Further the claimant abused his position by paying the contractor approximately 90% out of the Kenya Office when he knew or ought to have known that the work was poorly done and that the project was incomplete and nowhere near practical completion as per the contractor's agreement. The action was in breach of the claimant's fiduciary duty to the company and also placed the claimant's position of good faith in an untenable position.

2) The claimant was found guilty of the 3rd charge (trust relationship broken down) in that as a result of the claimant's management style, the staff and distributors felt generally intimidated and threatened by the claimant. In particular the distributors in Uganda were categorical that they were no longer able to work with the claimant. That threatened the operations of the company's business in Uganda and demonstrated a total lack of compatibility with the other members of staff. Further the claimant had indicated to the Financial Director and Vice President of Africa that the claimant had paid a sum of USD 47, 040.00 to the contractor doing the

Uganda Warehouse when in fact the claimant had paid the contractor USD 54, 865.08. The same amounted to the claimant's breach of his fiduciary duty to the company and irredeemably breached his position of good faith.

3) Accordingly, the report indicates that the claimant had breached the Company Disciplinary Code on account of unauthorised possession or misappropriation of company property, or property belonging to other employees, customers or suppliers; misrepresenting any information to the company which results in an unjustified gain for the individual or had an adverse effect on the company; and committing or being found guilty of having committed any act which may affect the trust relationship between the company and the employee. The breaches would lead to dismissal.

The claimant submitted his detailed mitigation dated 23.04.2012. He concluded that he believed that he had a lot more to give the company and which could be gainful to the company and the region in many capacities that would outweigh the two charges of misuse of office and mistrust of relations. The company also made detailed aggravating factors by one David Thomas. The presentation signed 24.04.2012 concluded that the claimant had to be dismissed on grounds that he broke his position of trust with the company by going over his mandate to pay the contractor outside of the agreed terms of the contract. Further the claimant was unable to carry out his job in Uganda as a result of the trust relationship that had broken between the claimant and that of distributors in Uganda. The relationship was irreparable and the company feared for the claimant's life if he returned on company duties. Also, the claimant had not followed company procedures in disciplining and managing staff resulting in a lot of unhappiness with certain staff members causing a general uneasiness in the office amongst the staff.

The claimant submitted further mitigation to the chairman dated 27.04.2012.

The detailed brief signed on 30.04.2012 by the chairperson Marco Taylor recommended that the claimant be terminated with immediate effect because charges 2 and 3 had been established and the claimant was in breach of fiduciary duty to the company and had irredeemably breached his position of good faith. The termination was recommended to be with payment in lieu of notice together with other terminal dues. The termination letter was dated 30.04.2012 and signed by Veronica Locke, HR Director, GNLD Africa.

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

The **1st issue** for determination is whether the persons who were involved in the disciplinary proceedings against the claimant lacked authority to do so. It was submitted for the claimant that the letter of appointment was between the claimant and the 1st respondent. The 2nd respondent was not involved and is submitted for the claimant that involvement of the 2nd respondent rendered the proceedings a nullity. The claimant admits that his salary was paid by the 2nd respondent. The Court returns that throughout the disciplinary hearing the claimant did not dispute the authority of the persons involved in handling his case. The Court further returns that the claimant knew that the respondents though separate companies, they were his joint employers. The Court also returns that as long as the employer had assigned those who acted in the disciplinary case and there was no contractual or statutory provision barring them from acting, then the employee cannot purport to dispute clear authority of the employer in the disciplinary process. Thus the Court returns that all those involved in the disciplinary process had authority to act, there was no contractual or statutory provision to impair the authority, and the disciplinary process was undertaken with due authority.

To answer the **2nd issue** for determination the Court returns that the meeting immediately prior to the disciplinary hearing and at which the claimant says he was urged to resign did not impair the disciplinary process in any material respect. The claimant has not established contractual or statutory provision that would bar parties from negotiating a termination agreement or strategy in the way of a soft landing or separation agreement, one way or the other, in view of and instead of the looming or ongoing disciplinary process.

The **3rd issue** for determination is whether the termination was unfair. The evidence is that the claimant was accorded a notice and a disciplinary hearing as per section 41 of the Employment Act, 2007. He replied to the allegations and attended the disciplinary hearing. The Court returns that the procedure was fair as envisaged in sections 41 as read with section 45 of the Act. As for the reasons or grounds of termination, there is no reason to doubt the record of the disciplinary hearing that the claimant admitted charges 2a and 3b with mitigating circumstances. The evidence at disciplinary hearing and in Court was that the claimant's relationship with the Ugandan distributors had broken down irreparably. The claimant testified that prior to his suspension a staff in Uganda had died and the distributors in Uganda had alleged that he had caused the death (but which was not true) and they complained that he had failed to attend the funeral. The claimant also testified in Court that he had paid 90% out of Kenya when the project in Uganda had not been completed and payment was upon reliance on the information by an officer on the ground. The Court returns that the grounds for termination were established as at the time of the termination as per section 43 of the Act. Further the grounds related to the claimant's conduct, capacity and compatibility as they related to the respondent's operational requirements as envisaged in section 45 of the Act. The Court returns that the reasons for termination were valid or genuine. Thus the termination was not unfair in procedure and substance. The Court finds accordingly.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The termination has been found not to have been unfair and the claimant is not entitled to a declaration that the termination of the claimant's employment by the respondents was wrongful, unfair and unlawful.
- b) The claimant was not unfairly terminated and he is therefore not entitled to be reinstated in his employment with the 1st respondent in the capacity of Vice President of Operations, East Africa without loss of employment benefits, seniority or service.
- c) The claimant prayed that all salaries and allowances or bonuses which the claimant has lost as a result of the unfair termination should be paid back to him in full from the date of dismissal to the date of the judgment. The prayer was in the nature of special damages, the same was not specifically pleaded and evidence was not provided to justify the claim and prayer. The Court finds that the prayer will fail as not justified.

d) The prayer for damages in the sum of Kshs. 6, 600, 000.00 for unfair and unlawful termination of the claimant's employment equivalent to 12 months' gross salaries of the claimant at Kshs. 550, 000.00 per month must fail because the Court has found that the termination was not unfair or unlawful.

e) The claimant has prayed for severance pay for each completed year of service amounting to Kshs. 825, 000.00. The Court finds that there was no redundancy and therefore there is no basis for severance pay as prayed for and as would be envisaged in section 40 of the Act on redundancy. In any event, the parties had alternative arrangements for contributory pension per contract of service.

f) The claimant prayed for house allowance at the rate of 12% of the gross pay totalling to Kshs. 2, 376, 000.00 for the period of employment April 2009 to April 2012. The claimant testified that the claim was based on his terms of service with his former employer. The claim obviously lacked contractual and statutory basis and it was not shown that parties had a grievance in that regard throughout the claimant's service. The claimant confirmed that a complete or consolidated monthly pay was agreed upon. In any event and as submitted for the respondent the claim was of a continuing injury throughout the period of employment and ceasing on the date of termination. The termination was on 30.04.2012 and the suit was filed on 19.12.2014 long after the lapsing of 12 months of limitation of action for such continuing injury as per section 90 of the Act. The prayer will therefore fail.

g) The claimant is entitled to the certificate of service per section 51 of the Act.

h) The Court has considered the parties' margins of success and returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered and the suit determined with orders:

a) The respondent to deliver a certificate of service to the claimant by 01.12.2018.

b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE