



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 77 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DOROTHY VIVIAN OGUTUCLAIMANT

-Versus-

MUMIAS SUGAR COMPANY LIMITEDRESPONDENT

JUDGEMENT

The Claimant herein alleges that she was unfairly terminated by the Respondent and seeks the following remedies -

- a) A declaration that the termination of the claimant's services by the respondent was unlawful.
b) An order for the unconditional reinstatement of the claimant back into the respondent's service.
c) Only by way of an alternative to (b) above payment to the respondents as follows:
d) Damages for unlawful termination

Kshs.9,783.93 x 12 months= Kshs.1,101,407.16

Two Month Salary in lieu of notice= Kshs. 183,567.86

Leave days accrued Kshs.91,783.93/30

x 38=Kshs. 116,259.64

13 days unpaid working days

Ksh.91,783.93/30 x 13 =Kshs. 39,773.03

Gratuity/Severance pay 15/100 x

Kshs.185,576.04 x 7 years=Kshs. 96,373.12

Unremitted pension upto June 2014=Kshs. 246,471.18

TOTAL

KSH.1,783,851.99

- e) Unremitted pension for all claimants from July 2014 to February 2015.
- f) Certificate of service
- g) Costs of this suit plus interests.
- h) Any other or further remedy this court deems just and expedient to grant.

The Respondent filed a Memorandum of Response in which it denies the allegations of the Claimant in the Memorandum of Claim. The Respondent avers that the Claimant was involved in malpractices that were in breach of the Respondent's Code of Conduct and Business Ethics Policy, the Claimant's Employment contract, the Respondent's Rules and Regulations and the Respondent's ISO Procedures. The Respondent avers that the malpractices were revealed by a forensic investigation carried out by PriceWaterHouse Coopers (PWC) at the request of the Respondent's Board.

The Respondent avers that following the revelations in the report the Claimant was suspended from duty on 10th December, 2014. The letter of suspension also required the Claimant to show cause why disciplinary action should not be taken against her. The Respondent further avers that the Claimant was subjected to a disciplinary hearing on 5th February, 2015 and was terminated on 13th February, 2015.

The Respondent avers that the termination was regular, procedural and justified. The Respondent states that the Claimant's terminal benefits including 2 months' salary in lieu of notice, leave days accrued, pension and a certificate of service are available for her collection at her convenience.

The Respondent prays that the Claim be dismissed with costs.

At the hearing the Claimant testified on her behalf and called 3 witnesses. The 3 witnesses, like the Claimant, are all former employees whose employment contracts were terminated around the same time as the Claimant and who have also filed suits against the Respondent in this court and for which this claim is a test suit.

Claimant's Case

The Claimant testified that she was employed by the Respondent on 13th March, 2008 as a Field Assistant. She left employment on 13th February, 2015 when she received a letter of termination of her employment. The grounds for termination was that on 8th October, 2013 she irregularly terminated plot number 100/800/2 in breach of the ISO procedure.

The Claimant testified that from the time she was employed up to the date of termination she worked within the nucleus estate. She explained that the nucleus estate is made up of farms owned or leased by the Respondent.

She testified that she was served with a letter of suspension/show cause letter which stated the grounds for suspension to be that she irregularly terminated farmers plots in the system between 2012/2013 and 2013/2014. She was required to submit her defence within 48 hours.

The Claimant responded to the show cause letter on 15th December 2014. In her response she stated that her role as a Field Supervisor was to advise both the Sector Manager and the OPM to edit AMS data and that the advise was regular. She further stated in the response that in all her activities the Sector Manager and the OPM had to approve the request and then advise ASA on the financial implications of the proposed action.

The Claimant denied terminating any field either regularly or irregularly as this was the responsibility of the administration supervisor as advised by either the sector manager or the OPM after their approval. She stated that if there were any losses resulting from termination of plots it was the OPM who shouldered the responsibility.

The Claimant testified that the Notice to Show Cause letter was signed by the Managing Director and not by his immediate supervisor as provided in the disciplinary procedure of the Respondent. The Claimant further testified that she was on suspension for a period of 3 months from 10th December, 2014 to 13th February, 2015 when she received the letter of termination. She stated that this is against the Respondent's disciplinary policy which provides for suspension for a period not longer than 21 days.

The Claimant testified that she was invited for a disciplinary hearing on 5th February, 2015 which lasted between 2 and 5 minutes. She stated that she was not provided with the plot numbers of the fields she is alleged to have terminated irregularly. She further testified that she was not provided with a copy of the report from Price Water house Coopers.

The Claimant testified that among the members of the disciplinary committee at her disciplinary hearing was Mr. Boniface Makhandia, Head of Agriculture and Nucleus, who inducted the Claimant on all activities including editing. The Claimant explained that termination of plots is a data editing term referring to either de-activating or making a field inactive or greying the data. She explained that termination does not mean termination from Mumias Sugar Company. She said termination is done to reconcile the data with what is on the ground.

The Claimant testified that plot No.1001800/2 which she is alleged to have terminated does not exist in the nucleus estate where she worked. She stated that nucleus plots have 8 digits while the plot she is alleged to have terminated according to the letter of termination was 7 digits. She stated that the first digit for nucleus plots begins with a numeral zero (0) while outgrower plots begin with numeral one (1).

With reference to the disciplinary hearing the Claimant testified that the minutes did not reflect what happened at the meeting. She testified that she was not given an opportunity to defend herself.

The Claimant referred the court to a communication dated 9th February 2015 from Head of Human Resource to the Managing Director with a copy to the Chairman of the Board. The advice given to the Managing Director by Head of Human Resource was that it is not possible to terminate plots in the nucleus estate because the plots belong to the company. The Head of Human Resource further advised that the charge of fraud is not tenable. The Head of Human Resource further stated that the Board was not furnished with sufficient information to enable the members make a proper decision. The Claimant testified that the same Head of Human Resource who advised the Managing Director against terminating her employment on grounds of termination of a field in the nucleus estate is the one who signed her letter of termination on the same ground he advised against. She stated that there was email correspondence suggesting that there was external pressure to terminate her employment.

The Claimant testified that she had the opportunity to read the report of PWC and confirmed that there was no recommendation for the termination of her employment. She testified that the report filed by the Respondent was not complete as it did not contain the Scope of the report and appendices, and further, the numbering was not sequential. She further stated the report is not signed and does not give the names of the person(s) who prepared it.

The Claimant testified that the termination of her employment was unlawful as the allegations against her were not genuine. She further testified that she had no warning letters before the termination.

The Claimant prayed for a declaration that the termination of her employment was unlawful and orders for her unconditional reinstatement. She further prayed for payment of damages for unfair termination, unremitted pension and other prayers as in the Statement of Claim.

Under cross examination the Claimant stated that at the time of termination her Sector Manager was Mr. Ongech who did not sit in her disciplinary panel. She stated that at the disciplinary hearing she was asked if there was any information she wished to present to the panel other than what she had stated in her response to the notice to show cause. She stated that she told the panel that she expected the allegations to come from the disciplinary committee. She stated that she worked in the nucleus estate throughout her employment and some of the inputs the company gave to the nucleus plots were fertilizer, chemicals for

weed control, money for manual weed control (weeding), land preparation and practically all activities.

The Claimant stated she did not have any objections to the disciplinary panel except Mr. Makhandia and Mr. Mutonyi but did not raise any objection. She stated that her terminal dues were specified in the letter of termination but she did not collect it because she would have had to sign a declaration that what was paid was full and final settlement, yet she did not agree that the termination was fair.

The Claimant stated that the communication from Head of Human Resource to the Managing Director was confidential and not addressed to her but she came across it while searching for evidence.

The Claimant stated that she had no personal vendetta with the Managing Director or the Head of Human Resource. She stated that she was not cleared of wrong doing. She stated that she did not believe anything contained in the PWC report.

CW2 BARASA PIUS testified that he used to work at Mumias Sugar Company as Farmers Services Manager having risen through the ranks from the position of Supervisor. He testified that his employment was terminated on 13th February, 2015 for reason that he terminated plots irregularly. He stated that he was working under Outgrowers Development Services Section (ODS) which deals with farmers who are sourced from outgrowers. He testified that the role of Farmers Services Manager was to co-ordinate cane farming activities in the outgrowers zone assigned to him. The role commenced with recruitment of farmers and entering them in the Agricultural Management System so that they can be co-ordinated through the system. The Farmers Services Manager coordinates input supply such as fertiliser, seed and seed maintenance, monitor the crop from stage one to harvesting and ensure data is clear and clean so that it can be used for planning purposes and to ensure the data in the system is the same as on the ground. He testified that this is done by editing cane fields also known as termination. He testified that these activities are contained in the field modification chain form. He testified that termination is one of the major duties of a Farmers Services Manager. He testified that termination means deactivating a plot for a farmer who has fallen out of cane farming either at the expiry of the contract or when a farmer has opted to pull out of cane farming, or where before the end of a contract the farmer opts to move out of cane farming by uprooting the cane. He stated the reason for termination is to avoid losing inputs to plots with no cane or planning on plots that do not exist. He stated the information is used for planning for inputs and harvesting. He explained that after termination of plots all the data remains on the Agricultural Management System. He stated that the non-active plots remain in the system until a decision is made whether the farmer can be brought back or removed completely. He stated that if a manager failed to terminate plots which are not active he would be misleading the company.

The Claimant testified that he knew one Musa Odondi who was a Zonal Manager with same duties as himself. He testified that Musa failed to terminate plots that did not have cane and was warned by his immediate supervisor on 13th May, 2013. He testified that when Musa started terminating plots after the warning his employment was terminated on grounds that he terminated plots.

CW2 testified that he was aware of the audit by PWC but he was never interviewed by PWC. He testified that he saw a copy of the report at his advocate's office.

CW2 testified that he was suspended on 3rd September, 2014 on grounds of fraudulent termination of farmers plots. He testified that in the letter of termination the reason was changed from fraudulent termination to irregular termination. He denied that he defrauded the Respondent.

He testified that he attended a disciplinary hearing in early February, 2015 but was not informed of the charges against him. He stated the disciplinary hearing session lasted about 5 minutes and he was given plot numbers in the letter of termination but not at the disciplinary hearing or in the disciplinary letter. He stated that the description of the plots in the letter of termination is 6 digits instead of 8 and he is not able to identify the plots he is alleged to have irregularly terminated. He stated that he had the opportunity to read the letters of termination of his colleagues all of which had 6 digits.

CW2 testified that he was not given a copy of PWC report with the letter of suspension or during

disciplinary hearing. He stated that the PWC report does not recommend the termination of employment of any person and the report did not have any recommendations. He testified that there was nothing wrong with termination of plots and in his opinion the people who prepared the report were not properly advised about the difference between termination of plots and termination of contracts. He stated that had he been interviewed he would have explained the difference.

CW2 testified that he worked for the Respondent for 27 years from 1st December 1987 to 13th February 2015 and for all these years they were doing the same thing. He testified that under the old system they were "dropping" plots while under the new system they were "terminating" plots.

CW2 testified that he had reservations about Boniface Makhandia for 2 reasons. The first is that at one time he worked with Mr. Makhandia as his colleague in the same rank and they were all terminating plots. The second reason is that after Mr. Makhandia was promoted he failed to explain to PWC what termination of plots meant and thirdly that Mr. Makhandia was the one authorising termination of plots by the employees working under him. CW2 stated that Boniface Makhandia was also the one who inducted the new recruits and showed them how to terminate plots in the system.

CW2 stated that the decision to terminate his employment together with others who worked in ODS was unfair and whoever terminated their employment is aware of having done the wrong thing.

He prayed that the court orders remedies as prayed in his statement of claim.

Under cross examination CW2 stated that he was giving evidence in support of Dorothy the Claimant. He stated that he had known Dorothy from the date of her appointment, about 5 years, but they worked in different departments. He worked in outgrowers section while Dorothy worked in nucleus estate, but under the same Agriculture department. He stated that he is one of the Claimants who had filed suit against the respondent and his claim is no.67 of 2015. He stated that he has direct interest in the outcome of the present claim. He stated that outgrowers and nucleus had some similarities and some differences.

CW2 stated that the company gave inputs to farmers in the form of loans that was recovered when the cane was harvested. He stated that where plots are terminated before harvesting the company recovers the loans through the legal process which is a long process. The Claimant stated he was not interviewed by PWC but was aware Mr. Makhandia who was Operations Manager, Eastern Site and Mr. Mutonyi who was Operations Manager, Western Site may have been interviewed by PWC. He stated that he cannot confirm that all Managers in the rank of Mr. Mutonyi were interviewed by PWC.

CW3 MUSA ANIGRO ODONDI, testified that he previously worked with the Respondent as Sector Manager, Sector 4. He also worked in harvesting and Transport sections. Before that he was Outgrowers Zonal Manager, a position he had risen to from his previous position as supervisor. He testified that he left employment on 13th February, 2015 after being served with a letter of termination. The reason for termination of his employment was irregular termination of plots. He stated that he did not terminate plots, but did the work required of him by supervisors.

CW3 testified that on 13th May 2013 he was issued with a show cause letter by his immediate supervisor for failing to terminate plots. He stated that he was suspended and stayed out of work for 21 days. When he reported back after suspension he was served with a letter of pardon but was directed to terminate plots within his zone within 6 months failing which his services would be dispensed with. CW3 testified that he complied and terminated the plots from the AMS System and made an inventory of what he referred to as outrageous plots which means plots with cane above 18 months old. CW3 testified that at that time the company was suffering from low cane volume due to poaching of cane by rival companies. He testified that they would go to the ground and find that cane which was about 15 months old had been harvested by a rival company and carried away at night. He testified that there were also plots which had no cane at all having been grazed and ploughed by farmers but the system indicated that there was cane in those fields.

CW3 further testified that outrageous plots also arose where the system reflected wrong cases. He

testified that all outrageous plots were referred to the manager for correction.

CW3 testified that after he terminated the plots everything was fine. He was thereafter transferred to Harvesting and Transport section. On 2nd September, 2014 he was again served with another show cause letter signed by the Managing Director on allegation that he had fraudulently terminated plots within the AMS system. He stated that this was a serious contradiction because he had been punished for failure to terminate the same plots yet after complying with the directions to terminate the plots he was being accused of fraudulently terminating the same plots. He testified that he was still confused as he did not understand what was happening. He stated that he was being punished for offences that had occurred many years back, which in his opinion was against natural justice.

CW4 HEBRON LITSULITSA ADOLI testified that he was employed by Mumias Sugar Company between April 1999 and 13th February, 2015. The reasons for termination of his employment was that he supervised irregular termination of plots by his Zonal Managers. He testified that this was not true.

He testified that he joined the company as a Management Trainee in Agriculture Department and underwent training in all departments. He was thereafter moved to the position of Assistant Economist in the same department before moving to the position of Area Manager, Out growers, then Zonal Manager, Out growers. At the time of termination he had risen to the position of Operations Manager, Transport and Harvesting.

CW4 testified that he was suspended on 2nd September, 2014 on grounds of overseeing fraudulent termination of plots by Zonal Managers in Outgrowers section in 2012/2013 and 2013/2014. He testified that in 2013 he was heading Transport and Harvesting and was not in outgrowers. He testified that he was suspended with about 17 Zonal Managers who worked in outgrowers during the years 2012 /2013 and 2013/2014 financial years. He testified that later the company suspended about 17 supervisors. All the suspensions were on the ground of termination of plots.

CW4 testified that the employees who were suspended were terminated on 13th February, 2015. In the termination letters the grounds for termination of employment was irregular termination of plots. He testified that he was not aware of anyone who was terminated for fraudulent termination of plots. He testified that he was not served with a fresh notice to show cause for irregular termination of plots. He also testified that he was not served with any warning letter.

CW4 testified that the AMS system was introduced in 2006. Before that the company used COBOL SYSTEM and manual system. The change to AMS was to improve efficiency. He stated that AMS system is an agricultural based system which consolidates all agricultural activities including payment at a click of a button. He testified that the system improved efficiency.

He stated that the system allowed managers to make changes in the system based on the reality on the ground. The information is brought to the Manager by field Assistants and Supervisors. He testified that among activities in the system, activity No. 4 is to terminate plots. He said "termination" is a work process that helps to maintain integrity in the system to ensure a clean system. He stated that "termination" does not mean deletion as the plot terminated can be activated again.

CW4 stated that the window for termination of plots was a special request made by the Respondent to the developers of the system so that inactive plots could be de-activated.

CW4 testified that termination of plots is different from termination of contract, that termination of contract must involve Finance and Legal Departments. He clarified that termination of plots does not terminate the contract and is a tool of editing. He testified that it is an important tool because it is used to separate active plots from inactive plots. He stated that leaving inactive plots in the system would result in a misleading budget.

CW4 testified that as Outgrowers Manager his responsibility was to give the correct figures to budgeting section.

CW4 testified that he knew both Mr. Makhandia and Mr. Mutonyi, that the two were aware of the termination of plots and also terminated plots themselves but they were never punished. He stated that Mr. Makhandia and Mr. Mutonyi were not suspended.

CW4 testified that he received a suspension/notice show cause letter which he responded to. He also attended a disciplinary hearing on 5th February, 2015 where both Mr. Makhandia and Mr. Mutonyi sat as panellists and heard his explanation similar to the explanation he has given to the court. He stated that his disciplinary hearing took about 10 minutes and he was asked if he had anything to add to what he had stated in his response to the notice to show cause.

CW4 testified that the form used for termination of plots in outgrowers had some similarities and some differences from the form used in nucleus. He testified that the terminations by Dorothy were approved by Mr. Makhandia and that Dorothy did not do anything wrong. He stated that he was not aware if Mr. Mutonyi ever defended them. He stated that Mr. Makhandia was Dorothy's immediate supervisor.

CW4 testified that at the time of termination of Dorothy's employment Mr. Charles Owino was Acting Head of Human Resource gave his opinion to the Board that it was not possible to terminate plots in nucleus estate. He stated that in Mr. Owino's opinion the Board of Directors were not properly guided.

CW4 stated that he was interviewed by PWC but they seem not to have understood his explanation as they appeared not to have understood the difference between termination of plots and termination of contract.

CW4 stated that Dorothy is accused of terminating plot No.1001800/2. He stated that according to the field structure, nucleus plots start with "O" so in Dorothy's letter the first digit is supposed to be an "O" as she worked in nucleus but the letter starts with "I". He stated that there was a problem because the plots are supposed to have 8 digits but the plot referred to in Dorothy's letter contained only 7 digits. He stated that there is no field with 7 digits and the plot referred to in Dorothy's letter does not exist.

CW4 stated that it is not true that it is managers who brought Mumias Sugar Company to its knees. He stated that the company had been performing badly and in 2012/2013 and 2013/2014 the company was facing a lot of challenges of poaching, had a lot of serious shortages of cane and payment to farmers was a challenge. He stated that the company had started ethanol and bottled water production. He stated the bottled water was not performing well. He stated electricity production was also very low because of agreement with Kenya Power. He stated that he is not aware of any manager who was arrested and charged. He stated that the Managing Director in 2012/2013 was Mr. Peter Kebati and before him was Mr. Evans Kidero. He stated he was aware that both of the two previous managing directors have been accused of mismanagement. He stated that the problem of Mumias Sugar Company was mismanagement and that the managers whose employment was terminated were being used as scapegoats.

During cross examination CW4 stated that not all managers and supervisors were suspended or terminated.

Respondents Case

The Respondent called one witness, BONIFACE SHIKUKU MAKHANDIA the Agricultural Services Manager who testified that he joined the company on 28th October 1998 as a field superintendent and rose through the ranks to the present position. He testified that he worked with Dorothy, the Claimant from September 2011 to June 2012 in the nucleus estate. He testified that he did not take Dorothy through induction as she had already been inducted at the time she joined the company in 2008. He further testified that he did not induct Ian Kaparo Oduk, Anthony Osundwa, Wycliffe Nzuya or Hebron Adoli, but he took some other officers through induction. He testified that induction process entails taking an officer through operational requirements in both the field and the software, the company rules and regulations as well as answering any questions the officers may have.

RW1 testified that he was aware Dorothy was working in Nucleus estate farms and had he inducted her,

he would have taken her through land recruitment, land development, input requisition, operations including planting, weeding and fertiliser application standards, crop monitoring through to harvest and post harvest processes. He testified that land recruitment exercise in the nucleus involved either land owned by the company or leased land managed by the nucleus.

RW 1 testified that in 2012 the company was not performing well financially. The trend continued in 2013 and to the date of hearing the company was still making losses.

RW1 explained that termination of plots means removing the plot from the main field and putting it aside so that it does not appear in the system. The reason for termination is indicated in the system. He testified that terminated plots are not referred to when planning. He stated that plots are terminated on several grounds being when there is no cane at all, or after harvesting three (3) times. Before termination the plot is checked to confirm whether or not there are any costs. The safeguards taken are a physical verification that the farm has no cane or the farmer has pulled out willingly. The Respondent uses a software called the Agricultural Management System (AMS). A plot is terminated only after verifying that there is no cane, or where the farmer has pulled out willingly and there are no outstanding costs due to the company. If the field has any costs, the costs are transferred to another account of the same farmer or the Outgrowers Services Manager is requested to initiate a termination notice.

RW1 explained that irregular termination in his understanding means a termination where costs have not been recovered or transferred to another account. He testified that the investigations by PWC was done after the losses in 2012 and 2014 and revealed farms which had been terminated irregularly. He testified that the Agricultural Services Manager was asked to prepare a report of plots which had unrecovered costs but had been terminated in the AMS System Software. He testified that the ICT Department of the Respondent prepared a report.

After the ICT department prepared a report, the Respondent's Board of Management directed that a verification exercise be done to confirm veracity of the ICT. The Agricultural Manager formed groups which went out to physically carry out verification in an exercise that took 3 weeks. The report disclosed irregularities which included the following -

- (1) Plots which had cane with the same farmer but different account numbers which means the Respondent could not recover costs.
- (2) Plots with cane under a different farmer so that the Respondent could not recover costs.
- (3) Plots with cane which was private under the same farmer so that the Respondent could not recover costs.
- (4) Plots with cane which is private under a different farmer, so costs could not be recovered.
- (5) Plots where services had been rendered then terminated thereafter.

RW1 stated that these were issues of accountability. He testified that with the report from ICT and the verification reports, the management engaged PWC to carry out a forensic investigation to come up with the true position. He testified that the Board did not act on the ICT and verification reports because it required an independent audit. He testified that PWC carried out investigations and grilled several officers including himself. He testified that at the time of investigations he was Head of Operations Eastern Region and Nucleus, that he did not personally participate in the verification but facilitated the exercise as the manager in charge.

RW1 testified that PWC submitted its preliminary report in December 2014. He testified that he had an opportunity to study the report which made findings specifically on Agriculture and Ethanol. The report established a lot of malpractices by managers involving irregular termination of plots.

He stated that the Management of the Respondent acted on the report by suspending Managers who were

implicated in September 2014. Another group was issued with show cause/suspension letters in December 2014. He testified that among those terminated was the Claimant, Dorothy whose letter of suspension was signed by the then Managing Director Coutts Otolo. He stated that it was not unusual for the letter to be signed by the Managing Director because at that time the Managing Director was suspicious of all managers.

RW1 testified that the Claimant responded to the show cause letter on 15th December, 2014. He testified that he was instructed to constitute a disciplinary committee and call the claimant and other managers who had been suspended for disciplinary hearings. He stated that he was not implicated in the report and that is why the Managing Director trusted him to sit in the disciplinary committee. He stated that during the disciplinary hearing the claimant did not express her dissatisfaction with the composition of the committee. He testified that Dorothy presented herself for the disciplinary hearing together with her witness, one Everlyne Simiyu, a supervisor in outgrowers section, who at that time was a supervisor in Nucleus Estate and of the same rank as Dorothy.

RW1 testified that the Claimant was not exonerated at the hearing and the company decided to terminate her employment by letter dated 13th February, 2015. The reason for termination of her employment was irregular termination of plots in Nucleus Estate in breach of ISO procedure. He testified that the ISO procedure provided for the procedure for termination of plots and the Claimant had been taken through the ISO procedure together with all other staff of the company. He stated that the ISO procedure is used together with the work instructions manual.

RW1 testified that he knows Charles Owino who is a Credibility Development Manager and at the time of termination of Claimant's employment was the Acting Director of Human Resource.

He denied that the termination of the Claimant's employment was unlawful and prayed that the claim be dismissed with costs.

Determination

I have carefully considered the evidence in this case as well as the pleadings filed by the parties. The Claimant filed written submissions which I have considered. The Respondent did not file written submissions.

The issues arising for determination are in my opinion whether there was valid reason to terminate the employment of the Claimant, whether the Respondent complied with fair procedure and if the claimant is entitled to the remedies sought.

Reason for termination

According to the Claimant's letter of termination, the reason(s) for termination are stated as follows -

*We wish to inform you that after careful consideration of your case in the light of the available evidence, we have reasonable and sufficient grounds to conclude that **on 8th October 2013, you irregularly terminated plot Number 1001800/2 in breach of the ISO procedure.***

The above acts/omissions have led to loss of trust and faith in you and amounts to gross misconduct warranting Summary Dismissal. However, the management has directed that your services with Mumias Sugar Company Ltd be terminated with effect from 13th February, 2015.

The Claimant's letter of suspension however gave reasons for suspension as follows -

A serious complaint has been received regarding your conduct/work in that during the financial year 2012/2013 and 2013/2014 you failed to discharge your duties as required, contrary to your employment contract, code of conduct and business ethics policy and company rules and regulations by irregularly terminating farmers plots in the system occasioning financial losses to

the company.

In the written submissions filed on behalf of the claimant, it is submitted that the plot number that the claimant is alleged to have terminated does not exist as the number does not belong to plots in the nucleus estate where the Claimant was working for the entire period she was in the employment of the Respondent. The Claimant's witnesses including the Claimant herself, and RW1 were in agreement that plots in the Nucleus estate had a prefix 'O' (number Zero) as the first number while the prefix "1" (number one) denoted plots in the Northern Zone which was different from nucleus.

At paragraph 9 of the Memorandum of Response it is pleaded as follows -

Arising from the verification exercise and the Report from the ICT department, the Respondent Board commissioned an audit and engaged M/S Price Water House Coopers (hereinafter PWC), an independent private audit firm to do a forensic investigation and establish the authenticity of the allegations therein.

It is further pleaded at paragraph 17 of the Memorandum of Response as follows -

... the Claimant was properly dismissed on grounds of being involved in a scheme to irregularly terminate plot No.1001800/2 in breach of the ISO procedure. Such irregular termination occasioned loss of faith the Respondent had towards the Claimant with the result that she could no longer be retained as an officer with the Respondent. ... this was an act of gross misconduct and the same warranted summary dismissal.

RW2 testified that the Respondent's ICT Department prepared a report which was verified on the ground and another report was prepared by the verification team on the verification exercise. He testified that after receiving both the ICT and the verification reports the Respondent engaged PWC to carry out a forensic investigation. The evidence of RW1 was that it is after the PWC report unearthed a lot of malpractices that the Claimant and others were suspended. Excerpts of the PWC report are appended to the Memorandum of response as Appendix 1 thereof. The Appendix contains names of employees alleged to have irregularly terminated plots. For the Claimant, the report indicates that she terminated Field No.100180 plots 2 initial reference No.1001800/2 on 8th October 2013. The report further indicates that at the time of termination of the plot there was an outstanding amount of Shs.16,987.73 arising from harrowing. The excerpts of the report attached to Respondent's appendix 1 does not state that the termination was irregular. The title of the page under which the Claimant's name appears is "LIST OF NUCLEUS PLOTS TERMINATED WITH THE INPUT FINANCE STILL RECORDED ON THE PLOTS." There is no explanation on how or why the termination was considered to be irregular by the Respondent and a ground for termination of the Claimant's employment.

In both her letter responding to the suspension/show cause letter and in the minutes of the disciplinary hearing, the Claimant asked for particulars of the plot she was alleged to have terminated irregularly. She also stated that her role as a field supervisor was not to terminate plots but to advise her superiors who then gave feedback on action to be taken. At the disciplinary hearing the Claimant stated in answer to questions put to her by the disciplinary panel that she was not even aware that she had rights to terminate plots in the AMS system. She stated that only the office of Administrator or someone with rights can effect the termination on the AMS System.

Paragraph 16.4 of the Agricultural Management System (AMS) provides for the role of Field Assistant as follows -

16.4 The role of A Field Assistant in AMS Data Management

The field assistant has a vital role of updating the system through documentation of change requests for incorrect date in the system after physical verification with the true situation in the field, the AMS Farmer register, and Cane inventory reports.

Failure to regularly make this updates will hinder service delivery to farmers due to inconsistent data.

16.8 Data Verification tools maintained by the Field Assistant in the field

Forms and reports used by the field Assistant to compare the system tools data with the physical ground information and escalate for update through the field supervisor to the Zonal Manager who has data correction rights. The verification tools used include:

- 0 to 8 months inspection forms*
- Cane census records*
- Field Staff Farmer register*
- Cane inventory*
- The field Map*

16.10 Data Correction Criteria (ODS/NE)

- Print the farmer register and cane inventory monthly*
- Verify against the field assistants ground register and inventory*
- Compare and identify variances in field, plot, field distance and farmer details or other data set*
- Record identified incorrect information on the field modification form*
- For cases of activity due dates or completion update raise related transaction form*
- The Field Assistant Avail the form to the Area Supervisor for authentication*
- The Supervisor avail the form to the Zonal manager for Approval of the activity.*
- The Zonal manager effects the changes for affected fields in the system and makes sure the information is saved before quitting the system.*
- The data appraisal form is completed by the supervisor to confirm correctness of data and level of accuracy then approved by the Zonal Manager.*
- A copy of the data appraisal form is maintained for reference by the Zonal Manager and the OSM/NEM*

14.0 Work Instruction on Dropping, Termination/Cancellation of Farmers Contract

14.1 The field assistant shall identity plots for abandonment/Dropping/Termination.

14.1 The Field Assistant will prepare field modification forms listing cases of abandonment, dropping and termination.

14.2 The Field Supervisor shall generate notifications to the affected farmers with evidence to warrant dropping and copy to the farmer's file.

14.3 The Zonal Manager will retrieve the farmers file(s) investigate the physical, financial and

dispute status of the plot(s) to authenticate reason for proposed dropping and file a report in the farmers file with recommendations.

14.4 The Zonal manager will forward the file(s) to the Outgrowers Services Manager for final ODS recommendation.

14.5 The Out growers services manager will review the reasons brought forward and raise a termination of plots notice to the farmer counter signed by the Head of Department and forward the same to the Agriculture Services Accountant for a final decision and copy to the Legal Services Manager.

14.6 Upon receipt of the Agriculture Services Accountants advice the OSM Shall raise a cancellation of contract letter to the farmer, copy to ASA, LSM, farmers file and terminate from cane fields in AMS.

This confirms the claimant's averments in her response to show cause letter and at the disciplinary hearing that she did not have rights to terminate plots in her capacity as Field Assistant in Nucleus Estate.

It was the Claimant's averment that the Respondent was under external pressure to take action due to the poor financial performance of the company and that the termination of her employment was a result and outcome of the external pressure. The Claimant stated that even the then Acting Director of Human Resource advised the Board against termination of employment of staff working in the Nucleus Estate on grounds of irregular termination of plots. The Claimant produced a confidential Memo from the said Acting Director of Human Resource to the Managing Director and copied to the Board in which he advised against the termination on the advice of PWC as in his Opinion PWC was not properly briefed. The email is reproduced below -

MEMO

To: Managing Director

cc: Chairman, BNHRC

From: Director of Human Resources (Ag.)

Date: 9th September, 2015

SUBJECT: DISCIPLINARY CASES ON TERMINATION OF PLOTS BY AGRICULTURE STAFF

The above subject refers:

Following the disciplinary hearings held on 5th and 6th February 2015 in Mumias and after careful review of sections of the PWC report on the Termination of plots by Agriculture staff availed to us, we wish to make the following observations that we feel may be of importance to management in objectively deciding the fate of the affected employees:

The thread throughout the disciplinary hearings indicate that the process of termination was the only avenue for resolution of issues of data integrity and other related disputes between the Company and farmers. It was also important in resolving issues in instances where what was on the ground vis-a-vis what existed in our Agriculture management information system differed.

It is important to note that this was a procedure that had been done since inception of the company and that only the terminology had changed. The process does not result in the company losing any money as the costs are accrued while it continues to draw interest unless an individual benefits directly or indirectly from the process.

It is not possible to have terminated plots in the nucleus estate because the estate belongs to the Company. In this case the farmer is the company. The actions therefore are all for and on behalf of the company. It is also on record that the staff working in the nucleus estate did not have requisite rights to do the terminations as alleged. This makes the allegations of fraud against Nucleus Estates Staff untenable.

It would appear that the Board of directors and the investigating auditors were not furnished with sufficient information to guide in making informed decisions on this matter by the process owners.

Throughout the hearings and from the audit reports, it was not demonstrated that the affected employee benefited directly from the plot terminations.

Terminated plots can be reinstated into the system and recoveries made as was demonstrated by some of the interviewed staff. Finance department should demonstrate efforts so far made in making any recoveries on the affected plots in the period under review. The finance department clearly failed in their fiduciary duties in as far as tracking of debts and recovery of the same is done.

The IT department should also not be absolved in their responsibility of providing quality assurance on this process as they should have known what was going on and raised the red flag in time.

In the absence a report from the process owners supporting management's position in this matter, it would appear that we do not have a strong case against the said employees and should it end up in court we may incur unnecessary costs in court charges.

This is however submitted for management and Board's review and consideration.

CHARLES OWINO AWINO

DIRECTOR OF HUMAN RESOURCES (AG)

The Claimant further attached email correspondence among the Management of the Respondents discussing the letters of termination in which the decision to terminate is stated to be based on PWC report which was outside the control of the Respondent's management. The email is reproduced below-

From: Charles Owino Awino [mailto:CAwino@mumias-sugar.com]

Sent: 11 February 2015 09:50

To: Vaslas Odhiambo; vodhiambo@stesabo.com

cc: Mathew Gae Walongo; Nemuel Onguti; Coutts Otolu

Subject: FW: CONFIDENTIAL - LETTERS & MINUTES - Termination of Plots by Agric Staff

Importance: High

Dear Vaslas,

As per your advise, you being an agent of MSC Board of Directors, we will proceed as advised and adopt your format of the letters to employees facing disciplinary action in Agriculture department to avoid any further delays.

In our view, we reckon that this kind of letter may lead to even greater exposure for the company. See attached, our version of the letters (in ZIP file) which should be read together with the show

cause notices and the replies from the employees.

However, we are still awaiting for the final recommendation from the Heads of Agriculture to be able to complete this process in line with the Company's Disciplinary and grievance handling procedure.

Kind regards.

Charles Owino Awino

(Ag) Director of Human Resources

From: Vaslas Odhiambo [mailto:CAwino@mumias-sugar.com]

Sent: Wednesday, February 11 2015 10:05 AM

To: Charles Owino Awino; Vaslas Odhiambo

cc: Mathew Gae Walongo; Nemuel Onguti; Coutts Otolu; Bonface Makhandia; Jonathan Mutonyi

Subject: RE: CONFIDENTIAL - LETTERS & MINUTES - Termination of Plots by Agric Staff

Charles,

I have had discussions with Nemuel & Mathew and Makhandia - (I have spent nearly one hour briefing Makhandia on the report-Mutonye is away but I will also discuss with him asp) and we are all clear and have agreed on the way forward including the final letter (sample attached herewith), based on best practice and nothing to do with me being an agent of MSC board.

I believe that Nemuel & Mathew had briefed you appropriately and good that we are all now on the same page.

We all agree that our action is based on an independent report by PWC Outside our control.
[Emphasis added]

Please let us prepare the draft letters ready for issuance tomorrow. Please share with me the draft letters.

Many thanks

Vaslas

Besides the foregoing, the Respondent did not adduce any evidence to prove what irregularity the Claimant committed on plot No.1001800/2. All that the PWC report states is that the plot was terminated by the claimant. The report does not state the termination was irregular. The Respondent did not specify what ISO procedure was breached by the claimant.

Section 43 of the Employment Act provides that in a claim arising out of termination of contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45(2) of the Act. Subsection 43(2) further provides that the reasons must be what the employer **genuinely believes to exist at the time of termination.**

In the present case the employer expressed doubt of the validity of the reason given for termination as demonstrated in the Memo from the Acting Director of Human Resource to the Managing Director to the effect that termination of plots was not irregular and further that it was not possible to terminate plots in

the Nucleus Estate which the Claimant was terminated for. The emails further intimate that the terminations were *beyond the control of the Respondent*. The Memo and emails are proof that the Respondent did not genuinely believe the reasons for which the employment of the Claimant was terminated.

I find that there was no valid reason for termination of the employment of the Claimant.

Fair Procedures

The Respondent's Code of Conduct and Business Ethics Policy, at Policy No.47 provides for the Respondents Disciplinary Procedure. Clause 47.4 provides as follows -

*47.4 AUTHORITY: The authority for disciplinary action rests with that member of Management who is directly responsible for the person concerned. Younger members of Management often feel that if a breach of discipline occurs a decision on punishment has to be made immediately for fear it will reflect on their competence as a Manager. In fact the need for instant punishment rarely occurs, although the aim should be to deal with all disciplinary cases as quickly as possible. Fragrant breached of discipline can always be dealt with by suspension. This at least gives the Manager the opportunity for consultation with his immediate supervisor and with HR Department before final punishment is decided on. **Periods of suspension should not be for longer than 21 days.** The role of HR Department is to advice on the employee's previous history, to give guidance on precedent and to ensure as far as possible that the disciplinary code is standard and that scales of punishment are reasonable consistent across all departments.*

47.5. When a punishment has been decided on the Manager immediately responsible should be seen to be the one who was responsible for the decision. A manager, who dissociates himself from the decision, placing the responsibility with his superiors, is displaying his own weakness and increasing his disciplinary problem in the future.

47.6. The most severe punishment that can be meted out is of course termination of employment. This is a particular strong sanction in a country where there is high unemployment. Employment should not be terminated without prior approval of the Head of Department and the Head of Human Resources. The Chief Executive office must be advised when it is intended to discharge anyone of supervisory grade and above.

*47.7. JUDGEMENT; All the facts and circumstances relevant to the case must be obtained before a decision on punishment is made. **If time is required to do this the employee should either be told to continue working, or if the evidence is sufficiently strong to establish a prima facie case he should be suspended from duty and told to report back at a stated time.** Care must be taken to ensure that employee understands that his suspension is to enable the full facts to be established and is not the punishment itself.*

47.8. When decisions on discipline have to be revoked or varied it is invariably because new facts come to light subsequently which were not apparent to the Manager at the time the decision was taken. Managers with long experience of industrial disciplinary situations will reflect on the number of occasions, which initially appeared to be "open and shut" but subsequently turned out to be more complex because other evidence presented later.

47.9. It is essential therefore that Management establish the full facts (or as many as are available) before a final decision is taken. The man's personal history record may also require to be checked before a decision is taken.

47.10. In all cases the employee must be given the opportunity to state his case.

47.11 Disciplinary action should not be taken in a state of emotion, ie irritation at the offender, anger at the incident, personal dislike of the offender or a biased decision will almost certainly

result. A decision based on elementary justice should be taken as objectively as possible and this is unlikely if the Manager concerned is himself emotionally involved.

The provision is quite elaborate. The first is that the authority to discipline rests with the Manager directly responsible for the employee concerned. This was flouted by the Respondent as the Claimant's letter of suspension was signed by the Managing Director himself and not the officer directly responsible for the Claimant who was the Sector or Zonal Manager. Secondly, the manual provides for suspension for a period not exceeding 21 days. The Claimant was suspended on 10th December 2014, called for disciplinary hearing on 5th February, 2015 and terminated on 13th February, 2015. This was a period of 63 days, exactly 3 times the period provided for in the Respondent's Code of Conduct. The Respondent did not bother to extend the suspension or to explain to the Claimant why the suspension took longer than provided.

Thirdly, the reasons in the Claimant's suspension/notice to show cause letter was different from the reasons for which she was dismissed. The claimant's suspension and disciplinary hearing was for, *irregularly terminating farmers plots in the system occasioning financial losses to the company between 2012-2013 and 2013-2014*. She was never told which plots she terminated even after she asked for the details in both her response to the notice to show cause and during her disciplinary hearing. She was never given the details which she learned about for the first time in the letter of termination. In effect therefore, she did not have an opportunity to defend herself against the grounds for which her employment was terminated. She was thus terminated without a hearing on the specific grounds in the letter of termination.

Finally the Claimant's letter of termination does not provide for Appeal. Clause 47.12 of the Respondent's Code of Conduct provides for an employee to appeal to the next level of management.

The disciplinary hearing was also not fair as the Claimant asked for details of the plots she was alleged to have terminated and was promised feedback, yet she was never given the details except in the letter of termination when she could no longer defend herself against the allegations. This means that no consideration was given to the Claimant's defence at the hearing before a decision was made to terminate her employment. As the Claimant stated in her testimony, the Respondent appears to have already decided to terminate her employment even before the disciplinary hearing hence the preparation of draft letters of termination discussed on email by the Management before the disciplinary hearing. The email correspondent contained in the Claimant's further list of documents. As early as 5th February, 2015 Ms. Immaculate A. Okite sent an email to Vaslas Odhiambo forwarding draft letters. The email states "Attached are draft letters to process for the termination cases involving Agriculture Staff for your input."

Based on the foregoing, I find that the Claimant was not subjected to a fair procedure prior to the termination of her employment.

Remedies

The Claimant sought the following remedies -

1. A declaration that the termination of her employment was unlawful. As I have already found above the termination was in breach of fair procedure and was without valid reason. I therefore declare the termination unfair in terms of section 45(2) of the Employment Act.

2. The Claimant secondly prayed for reinstatement or in the alternative, payment of terminal dues.

I have carefully weighed the option of awarding the Claimant compensation against an order for reinstatement. The circumstances of the Claimant's case are quite absurd. It was a reckless decision as the Respondents own Director of Human Resources had advised against the termination just a few days before the Claimant's was served with the letter of termination of her employment. From the evidence on record, the termination was premeditated and the disciplinary procedure was a mere cosmetic attempt compliance with the law and the Respondent's disciplinary procedure.

I have considered the grounds set out in section 49(4) of the Employment Act which provides as follows -

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

I have particularly considered subsections (b), (c), (d), (e) and (g). I have taken cognition of the financial position of the Respondent which came up during the hearing and has been in the public domain for a while, but I do not think the Claimant should suffer where she obviously is not at fault, merely because the Respondent is performing poorly and is under pressure to be seen to have acted to mitigate its loss making trend. The Respondent is a large organisation and it will not collapse simply because of taking back the Claimant.

For the foregoing reasons, it is my opinion that the fairest remedy for the Claimant in the circumstances of her case is an order for reinstatement.

I therefore order that the Respondent reinstates the Claimant back into employment to the position she had as at the time of termination of her employment or to a position as near as possible to the said position of Field Assistant without loss of benefits. The Respondent shall pay Claimant's Costs of this suit.

Before I conclude, I must point out that this suit was selected as a test suit for several other cases. It is my opinion that the facts of this case are unique and may not necessarily apply to the others. Although the

procedure for termination was the same in all the cases, the culpability of each Claimant, and remedies where applicable, ought to be assessed individually. This case will therefore be a test case only in so far as procedure for termination of employment is concerned.

Dated and signed and delivered this 30th day of March, 2017

MAUREEN ONYANGO

JUDGE