



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 67 OF 2014**  
**BETWEEN**  
**GILBERT MKOJI.....CLAIMANT**  
**VERSUS**  
**TEA WAREHOUSES LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Okanga & Company Advocates for the Claimant*

*Muturi Gakuo & Kibara Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim, on the 6<sup>th</sup> March 2014. He states he was employed by the Respondent as Finance Manager, from 1<sup>st</sup> May 2004, to 26<sup>th</sup> September 2013. His contract was terminated on the latter date by the Respondent, without notice or valid reason. He was not heard before termination. His last salary was Kshs. 202,860 monthly. He feels termination was unfair and unlawful, and seeks the following orders against the Respondent: -

- a. 3 months' salary in lieu of notice at Kshs. 608,580.
- b. Annual leave pay of 21 days at Kshs. 139,380.
- c. Travelling allowances for 2011 and 2012 at Kshs. 4,191.
- d. Salary for the month of September 2013, at Kshs. 202,860.
- e. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 2,434,320

Total.... Kshs. 3,389,331

- f. Costs and interest.

g. Any other suitable relief.

2. The Respondent filed its Reply, on 13<sup>th</sup> June 2014. Its position is that it terminated the Claimant's contract on 30<sup>th</sup> September 2013, due to gross misconduct. There were numerous irregularities in Respondent's books of account. Accounts were handled by the Claimant. He was issued warning letters prior to termination. He was paid all terminal dues. The Respondent does not owe the Claimant the sum of Kshs. 3,389,331 or any other amount. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. It was indicated by the Parties' Counsel that their Clients had been negotiating settlement out of Court, without the involvement of Counsel. It was hoped the dispute would be voluntarily settled in full. On 18<sup>th</sup> October 2016, an order of settlement was recorded on all prayers except the prayers on compensation, costs and interest.

4. The Claimant and Respondent's Managing Director George Patrick Nesbitt, gave evidence on the balance of the dispute, and closed their respective cases, on 18<sup>th</sup> October 2016. The matter was last mentioned in Court on the 29<sup>th</sup> November 2016, when Parties confirmed filing of their Closing Submissions.

### **Claimant's evidence**

5. The Claimant confirmed his employment history, and terms and conditions of employment, as pleaded. His duties included installing of controls and procedures on Respondent's income; protect assets; acknowledge liabilities; and ensure Directors' equity is protected. At least 9 Accountants worked under him. He carried out his responsibilities to the best of his ability.

6. The letter of termination dated 26<sup>th</sup> September 2013 alleged –

i. The Claimant failed to submit annual accounts for the Respondent and its associate Consolidated [Mombasa] Limited, to Company Auditors within stipulated time, for consecutive years 2011-2012. This contravened Kenya Revenue Authority Regulations and exposed the Respondent to penalties.

ii. Abdication of responsibility by the Claimant resulted in breakdown of accounting procedures and controls.

iii. Inability to balance cash flows resulted in banks dishonouring Respondent's cheques.

iv. Failure to provide timely and regular monthly financial reports to the Board of Directors resulted in Management operating in the dark, leading to the wrong financial decisions.

7. The Claimant refuted these allegations. He testified he prepared accounts for every month and year. He prepared and filed KRA returns promptly. For corporate tax, he submitted reports to the Auditors Easterbrook & Company, who advised the Directors. Whenever funds were available, the Managing Director would instruct the Claimant to pay taxes. In the absence of funds, the Managing Director did not come back to the Claimant.

8. When the Claimant joined the Respondent, the Respondent did not have a budget. He introduced budget. Invoices were not supported by documents. These were normal accounting errors, but supporting documents were there. He received a warning in January 2013. It was the only warning in 9 years. Auditors had been submitting their reports to the Directors. The Directors defaulted in meeting statutory obligations. The warning letter issued to the Claimant against this background. The Claimant was not heard before termination. Fair procedure was not observed.

9. Cross-examined, the Claimant told the Court he held CPA2 with over 20 years' experience. He was the overall boss in the Finance Department, reporting directly to the Managing Director. The Claimant

submitted accounts to the Auditors in time. VAT was to be submitted at the 20<sup>th</sup> day of subsequent month. He ensured this was done. He did not tell the Managing Director that VAT was to be submitted at such frequency.

10. There are penalties for late payment of taxes. Payment depended on cash-flow. He did not respond to the warning letter. The letter was not justified. The contents were not correct. Finance is the foundation of every Organization. Claimant's contract contained ground upon which the contract could be terminated immediately. Fair procedure had to be followed. The warning was in January 2013, termination is September of the same year, 9 months down the line. The Respondent acted outside the law. Contracts operate within the law. He prepared cash flow reports throughout. He signed, and understood the terms and conditions of service of his contract. Redirected, the Claimant told the Court he did not reply to the warning letter; it was not a letter to show cause why he should not face disciplinary action.

### **Respondent's case**

11. George Patrick Nesbitt testified the Claimant was Respondent's Finance Manager for 9 years. The Claimant's duties included overseeing the Accounts Department. There were 5 Accountants under the Claimant's supervision. He reported directly to Nesbitt.

12. By September 2013, accounts from May 2013 were not ready. There were delays in his work. In 2012, KRA audited Respondent's Books. It was found there were no returns. VAT, N.S.S.F, and N.H.I.F statutory payments had not been remitted. The Respondent had to pay these Bodies a total of Kshs. 59 million. There were months when statutory deductions were not paid at all. It was Claimant's responsibility to file returns on time, and to remind Nesbitt on signing of cheques. The Claimant was to draw all cheques to all creditors. He was issued warning letter in January 2013. He made attempt at self-improvement, but still had many problems.

13. The Respondent terminated Claimant's contract. Termination was in accordance with the law and the terms of service. It was justified. The Claimant failed to manage his docket properly. The Respondent carried out its own internal audit. The report is at page 2-7 of the Respondent's documents. It was concluded the Claimant was at fault in many areas. It was the responsibility of the Managing Director to implement the recommendations. The Claimant does not merit compensation. There was gross failure on his part.

14. Nesbitt testified on cross-examination that he has been Managing Director for 15 years. He used to discuss finances with the Claimant. He would point out to the Claimant which statutory dues had not been met. The Respondent prioritized what was to be paid, in event of financial constraints. The Claimant recommended who would be paid. There were cases where Nesbit would sign cheques, and later find they were still in the drawers. The documents from KRA imposing penalty on the Respondent were not exhibited before the Court. There were external auditors who also advised the Respondent. It is not true that Nesbitt slept on his job. Termination was not a knee-jerk reaction by the Respondent, after KRA audited the Respondent. Nesbit told the Court on redirection that the Claimant failed to reform even after receiving a warning in January 2013. The Respondent acted fairly.

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

15. The Claim has in part been resolved by the Parties, at their own level. In the view of the Court, the remainder of the dispute should similarly have been resolved by the Parties.

16. The evidence by the Claimant and by Nesbitt, leads to the conclusion that there was something amiss, in the Finance Department headed by the Claimant. Tax returns were not filed as they should have been; taxes were not paid as they should have been; financial reports were not prepared on time and availed to the Directors to guide them is stewardship of the Respondent, as they should have been; and signed cheques were not forwarded to the payees. These defaults led to overall poor performance by the Respondent, as the financial docket is the cornerstone of every enterprise.

17. There were corporate failures, which could be blamed on the overall structure of the Company. However, the Claimant had the responsibility to discharge his role in a manner that assisted the Company in correcting these corporate failures, and advise the Company on its statutory obligations, and the consequence of not meeting these obligations. In large measure, the Claimant contributed to the corporate failure, and did not have a good reason, to shift blame to the Directors and his Colleagues. He did not discharge his role to the best of his ability. He had received a warning in January and continued being sloppy and lethargic. Internal investigations confirmed the Claimant was the weakest link. In the view of the Court the Respondent had valid ground in feeling shortchanged and in terminating his contract of employment. The Claimant was central to the wellbeing of the Company. He was demonstrably lackadaisical, and termination cannot be faulted for want of valid reason. The Respondent satisfied the requirement of Sections 43 and 45 of the Employment Act, on validity of reason.

18. The Respondent however does not seem to have met the minimum standards of fairness, imposed under Sections 41 and 45 of the Act. The Claimant was issued a warning in January 2013. Internal investigations were carried out. There was no hearing of the Claimant. Section 41 is specific where the Employer contemplates termination on among other grounds, performance, the Employee must be granted a hearing. Hearing must be in conformity with Section 41 of the Act. The letter of termination dated 26<sup>th</sup> September 2013 indicates the Claimant was not heard. The law does not allow Employers to terminate contracts of employment at will. If there was a clause in the Claimant's contract suggesting the Employer could do so, that clause cannot be upheld by the Court; it suffers illegality.

19. Termination was justified, but did not follow fair procedure. To this extent, it was unfair. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination, at Kshs. 1,217,160.***

20. No order on the costs.

21. ***Interest granted at 14% per annum from the date of Judgment, until payment is made in full.***

22. ***Other prayers are marked as settled, as per the consent order recorded on 18<sup>th</sup> October 2016.***

IN SUM, IT IS ORDERED:-

***a. Termination was based on valid ground, but lacking in fairness of procedure.***

***b. The Respondent shall pay to the Claimant the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 1, 217,160.***

***c. No order on the costs.***

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

***e. Other prayers are marked as settled, as per the consent order recorded on 18<sup>th</sup> October 2016.***

Dated and delivered at Mombasa this 23<sup>rd</sup> day of June 2017

James Rika

Judge