



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1548 OF 2012**

**GEOFFREY GEKONE**

**MACHOGU.....CLAIMANT**

**VERSUS**

**DRY ASSOCIATES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Geoffrey Gekone Machogu, the Claimant in this case worked for the Respondent in the position of Investment Analyst from which he was later promoted to Senior Investment Analyst. He brought this claim alleging unlawful dismissal and withholding of wages.

2. The Respondent filed a Memorandum of Response and Counterclaim on 6<sup>th</sup> November 2012. At the hearing the Claimant testified on his own behalf and the Respondent called its Finance Manager, George Kenya Otieno.

**The Claimant's Case**

3. In his Statement of Claim dated 30<sup>th</sup> August 2012 and filed in Court on 3<sup>rd</sup> September 2012, the Claimant states that he was employed by the Respondent on 1<sup>st</sup> January 2005 at a gross monthly salary of Kshs. 15,000 plus commissions.

4. On 11<sup>th</sup> May 2011, the Claimant gave a one month's resignation notice to the Respondent. On 26<sup>th</sup> May 2011, while the Claimant was still serving his notice period, he was issued with a letter of summary dismissal by the Respondent citing allegations of misconduct.

5. The Claimant pleads that his dismissal was without any valid reason and that he was not heard prior to the dismissal. He states that prior to the dismissal, he was earning a gross salary of Kshs. 50,000 and that he had earned commissions in the sum of Kshs. 30,000 during the month of May 2011.

6. The Claimant's claim is as follows:

- a) A declaration that his dismissal was unlawful and unfair
- b) Kshs. 50,000 being the equivalent of one month's salary in lieu of notice
- c) Kshs. 80,000 being salary for the month of May 2011 together with interest

- d) Kshs. 600,000 being 12 months' salary in compensation for wrongful and unlawful dismissal
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

7. In its Memorandum of Response and Counterclaim dated 5<sup>th</sup> November 2012 and filed in Court on 6<sup>th</sup> November 2012 the Respondent admits that the Claimant was its employee up to 26<sup>th</sup> May 2011. The Respondent further admits that the Claimant had attempted to resign on 11<sup>th</sup> May 2011.

8. While denying the claim for unlawful dismissal, the Respondent states that the Claimant was summarily dismissed after it emerged that he had, without authority of the Respondent, secretly, on his own behalf, while purporting to have the authority, knowledge and/or approval of the Respondent, dealt with clients of the Respondent for his own personal gain.

9. The Respondent further states that on account of the Claimant's long absence from work prior to his dismissal, there was no opportunity for him to be heard. The Claimant was however given up to 3<sup>rd</sup> June 2011 to challenge the basis of his dismissal in a panel that would be constituted to hear the matter. The Claimant did not take up this offer.

10. In its Counterclaim the Respondent claims to have suffered loss and damage as a result of the Claimant's actions. The Respondent therefore claims the following from the Claimant:

- a) Lost commissions.....Kshs. 6,000,000
- b) Cost of notice to investors.....30,626

**Findings and Determination**

11. There are three (3) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

**The Dismissal**

12. The Claimant was dismissed by letter dated 26<sup>th</sup> May 2011 stating as follows:

*"Dear Geoffrey,*

*Subject: **Termination of Employment from Dry Associates***

*We have recently learned from Mr. Kaushik Shah, Chief Executive Officer, Safal Group that you have been working for Insteel Limited for some time as their Agent raising funds from investors and placing these funds with Insteel Ltd.*

*In other words, you have been engaging in unauthorized and private transactions without the knowledge of Dry Associates. As such, you have violated our employment terms with Dry Associates not to speak of the norms of integrity upon which this organization stands.*

*We note that you gave one month's notice of resignation on 11 May*

*2011. It now seems apparent that you submitted your resignation in the knowledge that your unauthorized and secret dealings with Insteel and possibly other companies would soon come to light, particularly as Timothy Karungu Karanja was terminated on 14 April for similar deceptive dealings.*

*A such, today will be your last day of employment at Dry Associates.*

*You should know that you duplicitous behavior may have put innocent investors at risk. In order to exercise our duty of care to innocent investors, we need to determine which of our investors may be at risk. As such, we are withholding your May 2011 pay until you provide us with the following information:*

- 1) A list of all investors placed into the unsponsored Insteel note programme,*
- 2) The amounts, dates, terms and maturities of such investments,*
- 3) A summary of all commissions received by yourself from Insteel as well as any other company you may have been working for while in the employ of Dry Associates.*

*As you have been absent the past several days, we have been forced to provide this Notice of End of Employment without the benefit of a panel of your peers. If you would like such a panel to be convened, please arrange to come to our offices before Friday, 3 June 2011 and we shall present the evidence to you.*

*(Signed)*

*James R. Dry*

*Managing Director”*

13. This letter accuses the Claimant of unauthorized secret dealings with the Respondent's clients for his own personal gain. Admittedly however, no specific charges on this account were served on the Claimant for his response.

14. The Court noted that prior to the dismissal the Claimant had served a resignation notice on the Respondent. In its final submissions filed on 1<sup>st</sup> March 2017, the Respondent takes the line that by the time of the dismissal, the Claimant had already resigned and no claim for unlawful dismissal can lie.

15. In this regard, the Respondent referred the Court to several decisions on the effect of a resignation as a legitimate mode of severing an employment relationship. In **William Kariuki v Kenya Civil Aviation Authority [2008] eKLR** it was held that once a resignation notice by an employee has been accepted by the employer, the employment relationship is effectively terminated and no dismissal can be effected thereafter.

16. This is the correct legal position as I understand it. The instant case is however distinguishable because the Claimant's resignation was never accepted by the Respondent. Indeed a reading of the dismissal letter confirms that at the time of dismissal the Claimant was still an employee of the Respondent.

17. Having decided to ignore the Claimant's resignation notice and instead to dismiss him, the Respondent was duty bound to notify the Claimant of the charges leveled against him. The reason given for this failure is that the Claimant was away from the office. The Court found this reason unconvincing more so because when the Respondent decided to dismiss the Claimant they were able to find him. The Court was even more perturbed by the illusion that the Claimant could be heard after the dismissal.

18. Overall the Court finds that the Respondent failed to establish a valid reason for the Claimant's dismissal as required under Section 43 of the Employment Act, 2007 and that the Respondent also violated the mandatory procedural fairness requirements set out under Section 41 of the Act.

**Remedies**

19. In light of the foregoing I award the Claimant eight (8) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the dismissal transaction. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for the month of May 2011.

**The Respondent's Counterclaim**

20. Regarding the Respondent's counterclaim the only thing I will say is that no evidence was led in support of the figures claimed. The counterclaim must therefore fail and is dismissed.

**Final Orders**

21. Ultimately I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 400,000
- b) 1 month's salary in lieu of notice.....50,000
- c) Salary for May 2011.....50,000
- Total.....500,000**

22. This amount will attract interest at court rates from the date of judgment until payment in full.

24. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of the case.

25. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mburu for the Claimant

Mr. Kimani for the Respondent