



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 241 OF 2016**  
**(FORMERLY NAIROBI ELRC CAUSE NO. 710 OF 2016)**

*(Before Hon. Lady Justice Maureen Onyango)*

**MARGARET MUKHUNGU ..... CLAIMANT**

**-Versus-**

**MUMIAS SUGAR COMPANY ..... RESPONDENT**

**J U D G E M E N T**

By Statement of Claim dated 25th April 2016 the Claimant alleges that she was employed by the Respondent, a sugar milling company, by letter of appointment dated 22nd June 2006 as an infrastructure and services manager. She states that she served the Respondent diligently and rose in rank to the position of director in various dockets in the company. Her last salary was Kshs. 724,000 per month.

The Claimant avers that in March 2015 the Respondent slashed her car allowance from kshs. 250,000 to Kshs. 125,000 per month, while her monthly gas allowance of Kshs.4000 was scrapped without any colour of right and to her disadvantage. The Claimant avers that between June and July 2015 her access to the corporate network and email were without notice or warning, blocked from time to time by the Respondent despite the same being key to her as employee and head of department and as executive management committee member, a matter which caused her to complain to the Managing Director and the Capability Development Manager who was at the time acting as Head of Human Resource Department.

The Claimant alleges further that without notification to her personally as head of department and executive committee member of the intention to declare several positions including hers redundant, the Respondent issued staff communication to staff on matters affecting her department which amounted to her unfair and unjustified treatment. The Claimant avers that on or about 24th July 2015 she received a letter dated 10th July 2015 notifying her of her redundancy effective 31st July 2015 and requiring her to clear and move out of the Respondents house that she occupied within 7 days, an act she considered malicious, unfair and illegal. She avers that the letter of redundancy did not indicate her terminal benefits in spite of several requests by her, until October 2015 when her terminal benefits were paid. She further avers that the Respondent failed to release her car logbook until November 2015 after she wrote a demand letter threatening to sue. She states that she received the letter of redundancy while out of station and her office was assigned to a new employee, Mr. Moses Owino.

The Claimant avers that the redundancy was used to disguise the termination of her employment as her docket of marketing and corporate communications was not abolished but renamed as Corporate Strategy, Planning and Communications and assigned to Moses Owino who was assigned her former

office and worked with the same staff who worked under her.

The Claimant further alleges that during her employment with the Respondent it made statutory deductions from her salary but failed to remit the same to the relevant authorities causing her to be served with a default notice by Kenya Revenue Authority for the sum of Kshs.2,647,046.00 with a risk of penalty and non issuance of clearance certificate. The Claimant prays for the following remedies:

1. A declaration that the Claimant's termination from employment was both unfair and unlawful.
2. An Order that the Respondent does forthwith pay the Claimant:-
  - i. Kshs.647,000,000/- being Reimbursement of the unlawfully deducted and/or scrapped remuneration for 5 months from March 2015 to July 2015, being car allowance and gas allowance.
  - ii. Kshs.2,289,600.00/- being the difference of the severance pay at 30 days for each completed year of service for 9 years based on the February 2015 pay before the aforesaid unlawful deductions (Kshs.724,400 x 9 – 4,230,000/- paid).
  - iii. Kshs.763,200.00/- being the difference of the three month's pay in lieu of notice based on the February 2015 pay before the aforesaid unlawful deductions (Kshs.724,400 x 3 – 1,410,000/- =paid)
  - iv. Kshs.125,000/- being Difference of the one month car allowance based on the February 2015 pay before the aforesaid unlawful deductions (Kshs.250,000 – 125,000/- paid).
  - v. Kshs.4,400.00/- being Unpaid one month gas allowance based on the February 2015 pay before the aforesaid unlawful scrapping.
  - vi. Kshs.196,581.82/- being Difference of the accrued leave balance (17/22 x 724, 400.00/= - 363,181.82/= paid)
  - vii. Kshs.8,692,800.00/= being Compensation for unfair and unlawful termination Kshs. (724,400 x 12).
  - viii. Kshs.2,647,046.00/= and Kshs.1,454,037.80/= respectively, being statutory deductions due and owing Kenya Revenue Authority for the period January to December 2014 as well as for the period January to July 2015.
  - ix. All accrued penalties and interest of statutory dues.
  - x. Costs of the suit.
  - xi. Interest on 2(i) to (x) herein above at Court rate from date of suit until payment in full.

The Respondent filed its Statement of Response in which it admits that the Claimant was its employee and further admits declaring her redundant but denies that the redundancy was malicious, unfair or illegal. The respondent further denies owing the Claimant the sums claimed or any other sum.

When parties appeared before the court on 21st November 2016 for directions they sought and were granted leave to proceed by way of written submissions. The Claimant filed written submissions on 14th December 2016 and served the Respondent on 12th January 2017. The respondent however failed to file its written submissions even after being granted leave to do so out of time on 23rd January, 13th and 20th February 2017. The court was therefore compelled to prepare the Judgment without the benefit of the Respondent's written submissions.

## Determination

I have considered the pleadings and written submissions of the Claimant together with authorities cited. The issues for consideration as set out in the Claimant's submissions which I will adopt are the following:

1. Whether the redundancy was unfair
2. Whether the Claimant is entitled to the remedies sought.

The process of redundancy is comprehensively provided for in section 40 of the Employment Act as follows:

### **40. Termination on account of redundancy**

*(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*

*(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the*

*reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*

*(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

*(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

*(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

The Claimant submitted that the Respondent did not comply with the procedure set out in section 40 and relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited** in which the Court observed that the employer must prove that it complied with the procedure set out in the law. The Respondent has not submitted any evidence of compliance with the provisions of section 40. The evidence on record shows that the Claimant's notification of redundancy was not made at least one month before the redundancy was effected (Refer to the case of **Thomas De La Rue (K) Limited v David Opondo Omutelema**) in which the Court of Appeal stated that both notification under section 40(a) (for employees who are union members) and 40(b) (for non union employees) must be of at least one month, that the notification must be in writing to the employee and the local labour officer. What the Respondent did was to issue the termination notice under section 40(f) but which it erroneously titled as Notification of Redundancy.

The Claimant further submitted that the Respondent failed to prove that the Claimant's docket was abolished in toto and that in the process of selection due regard was given to seniority in time, skill and ability as provided in section 40(1)(c). A reading of the letter of redundancy gives the impression that all executive director positions were abolished. The Claimant has not stated that there is any executive director that was retained or that there was no decision by the Respondent's Board to abolish all executive director positions.

From the foregoing I find that the redundancy of the Claimant was unlawful for failing to comply with section 40(1)(b) in that the Claimant and the local labour officer were not notified of the intention to declare the Claimant redundant at least one month prior to the redundancy. Other than the procedure, I find the selection was valid.

### **Remedies**

The Claimant prayed for payment of Kshs.647,000 being reimbursement of the unlawfully deducted and/or scrapped remuneration for 5 months from March to July 2015 being car allowance and gas allowance. I find that this is not payable as it was a decision by the Board of the Respondent that was implemented across the Board as a cost cutting measure affecting all employees of the Respondent who was undergoing financial strain and that it is unrelated to the Claimant's redundancy.

The Claimant further prayed for Kshs.2,289,600 being the difference between severance pay at 30 days per year worked for 9 years based on February salary (724,400x9-4230,000 paid). According to the law severance pay is based on the rate of (not less than) 15 days pay for every year worked. The Respondent paid at the rate of 30 days pay based on the Claimant's last salary of Kshs.470,000 which was her basic salary. The Claimant has not provided the court with evidence that she was entitled to more than she was paid which is in excess of the statutory minimum. The prayer is dismissed.

The Claimant further prayed for the sum of Kshs.763,2000 being 3 months notice based on her February 2015 salary of Kshs.724,400 less the amount paid. Having been declared redundant in July 2015 the Claimant's pay in lieu of notice should have been based on 3 months' gross salary of Kshs.595,000. She was therefore underpaid by Kshs.375,000 (1785,000-1,410,000). I award her the said sum of Kshs.375,000.

The Claimant is not entitled to difference between car allowance paid of kshs.125,000 and what was previously paid Kshs.250,000 for reasons already stated above. The same applies to gas allowance.

The Claimant further prayed for difference between what she was paid on account of accrued leave based on February pay. This is not payable as pay in lieu of accrued leave is always based on basic salary and not gross salary as the payment is not part of remuneration.

The Claimant further prayed for compensation. Having been paid severance pay and taking into account that the only reason her redundancy was unlawful was that the notification was less than one month, what the Claimant lost is only the pay for the notification period which is one months' gross pay. I award her the same at Kshs.595,000.

There is no proof that the Respondent did not remit statutory deductions of kshs.2,647,046 or that the Claimant incurred accrued penalties and interest on the statutory deductions or that the Claimant paid the same to Kenya Revenue Authority and therefore there is no basis for the claim or reimbursement thereof to the Claimant. The claim is dismissed.

### **Conclusion**

In conclusion, I find and hold that the redundancy of the Claimant was unlawful to the extent that there was no notification of the intended redundancy to the Claimant and the local labour officer at least one month before the redundancy was effected. I therefore award the Claimant a total of Kshs.970,000. The Respondent shall pay the Claimant's costs.

**Dated and signed and delivered this 22nd day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**