



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2264 OF 2014

CRISPUS MOGONCHI GISEMBA.....CLAIMANT

VERSUS

TAUSI ASSUANRANCE COMPANY LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – illegal and unfair termination of employment and failure to pay full salary and other dues.

1. On 18th December, 2014 the claimant filed his Memorandum of Claim. On 26th March, 2015 the respondent replied thereto. In March, 2016 the claimant filed an Amended memorandum of Claim. On 1st April, 2016 the respondent filed an Amended Memorandum of Response.

Claim

2. The claimant was employed by the respondent in October, 1996 as a Junior Clerk, he rose through the ranks to Senior Underwriting Manager. On 24th October, 2014 the claimant was suspended from work and terminated from his employment on 10th November, 2014 when he refused to resign from his position. The claimant was earning Kshs.400, 000.00 per month.

3. The claimant had diligently worked for the respondent over the years earning promotions. On 11th January, 2010 the claimant was congratulated for his work and promised that he would retire at 60 years. In February, 2014 the claimant was awarded special merit increment for exceptional performance. One month later he was accused of non-performance vide letter dated 10th February, 2014.

4. The claimant was maliciously accused of incompetence in the performance of his work and issued with a disciplinary notice on 24th October, 2014. This was proceeded by the respondent chief executive officer verbal abuses and discrimination at work and then wrote a letter to the labour officer to investigate the matter and before any investigations, the claimant was terminated from his employment.

5. The claim is for a declaration that the termination of the claimant's employment was malicious, illegal, and unfair and thus seeks reinstatement. A declaration that the claimant's fundamental rights in law and in the constitution have been violated. A declaration that the respondent is in breach of contract and be ordered to pay the claimant until his retirement age of 60 years. The claim is for general damages for breach of contract; loss of income; illegal and unfair termination⁴ of employment; and mental anguish and psychological torture.

6. The claimant is also seeking exemplary damages for loss of property on loan and mortgage as consequent upon unfair termination of employment and as a consequence the claimant sold his property at a loss of Kshs.4, 000,000.00 the amount he now claims from the respondent. Interests should be paid on the due amounts. Costs and any further relief that the court may grant.

7. The claimant testified in support of his case. Upon employment the claimant worked diligently and grew the respondent business and was promoted and his salaries reviewed upwards to Kshs.400, 000.00 per month. In July, 2013 the respondent's chief executive officer (CEO) fell sick and the board proposed the claimant to oversight the claims department and in December, 2013 the claimant was awarded Best Manager award and his bonus was doubled due to good performance. However, in February, 2014 the CEO changed and became hostile and called the Board on the grounds of being dissatisfied with the claimant's performance and proceeded to tell 6 managers to resign from their positions. These were;

1. Eva Wambui;
2. Thomas Njoroge;
3. Johnson Muchemi;
4. Stephen Obuge;
5. Joy Mutai;
6. Winnie Muoki; and
7. Fatuma.

8. The employees who included the claimant refused to resign but due to pressure, 4 of these employees resigned. The claimant became the subject of victimisation; the CEO called him and hauled abuses at him in front of his juniors.

9. On 27th March, 2014 the CEO wrote two letters of suspension to Evans Barasa and the claimant but the claimant was not issued with his letter. He got this letter in October, 2014 when he was called to the boardroom and directed to respond to various allegations in 48 hours and appear for hearing on 3rd November, 2014. The claimant was accused that;

1) Staplast files

The claimant was accused of charging the wrong premium rate at 2.85% instead of 12.5% yet the risk included inflammables which are high risk. That the warranties in the policy were deleted from the policy at 2.5% yet in such a case it was 15% per every million. Claims were made under the policy and the claimant admitted liability and when the policy expired the claimant failed to renew.

2) NK Brothers and WIBA liabilities

The claimant was accused that the client had two policies which he accepted at grossly under-declared by the claimant failing to notice the occupations disclosed by the broker required more cover and thus exposed the respondent to a big risk.

3) Underwriting surveys

The claimant was accused that on 14th August, 2008 he was taking policy covers and taking risk without a survey or report especially with Barot Agencies, Textplast Industries and Tokyo Cars. The mistake was noted on 5th June, 2014.

4) Issuing policies at lower rate

The claimant was accused that around 19th March, 2014 he issued motor insurance covers at reduced rates of 3.8% instead of 4.5%. In other case the claimant issued motor insurance cover higher than the brokers had requested for. He failed to update motor certificate register and issuing policies without checking them properly to Maruti Mining fires and thus exposed the respondent to losses.

10. The claimant denied all the allegations and accusations made against him as not being correct or not upon his duties to assess risks and that he had always done his work with diligence as required. All policies issued were authorised or approved by the CEO and the claimant was not to blame for any mistake.

11. On 3rd November, 2014 the claimant attended at his disciplinary hearing and was asked to resign as the CEO was unable to work with him but he refused. The claimant asked if he could have his benefits if he resigned but the board insisted that they would wait for him to decide whether to resign or be dismissed.

12. Another meeting was called for 10th November, 2014 for the claimant to update the board on his decision and when he declined to resign, he was issued with a letter of dismissal. The claimant pleaded his case noting the work frustrations the CEO had taken him through but the board chair insisted that the termination of employment was final.

13. The claimant is seeking exemplary damages and damages for discrimination against him on the grounds that when he asked for permission to attend at a funeral he was denied the same. This caused him trauma and he felt tortured. AKI nominated him to be part of the Motor Technical Committee to streamline the motor industry. In its first meeting a Task Force was formed and the claimant was nominated as the Chairman but the CEO refused him time or permission to attend subsequent meetings.

14. The claimant felt discriminated against him as the CEO was working with emotions. The CEO bought all other managers I pads but the claimant was left out. The agents and brokers travelled to Dubai but the claimant was left out. The respondent had a medical cover for staff, spouse and 5 children. In June, 2014 the respondent made changes and a memo was issued that the respondent would only cover 4 of the claimant's children and proceeded to remove his youngest child without consulting with him. His juniors started doing his work and got instructions over him through the CEO which was disrespectful. His nephew died and while at his burial the CEO called and quarrelled the claimant.

15. The claimant is also seeking damages on the grounds that the respondent had praised his work and confirmed that he would retire at 75 years as the retirement age was 60 years. The claimant took a mortgage and following his termination of employment he was forced to sell the property at a loss to avoid attachment. The respondent should bear the costs in the loss.

16. In cross-examination the claimant testified that he has a Master's degree as his highest qualification but this is not attached to his court documents. The Insurance Regulatory Authority asked for his academic documents but he had to apply to India where he studies but has not been able to get them since 1997 the respondent has asked for these documents but some got lost and efforts to get copies from place of study not successful. The respondent allowed him to study and claim for costs but the college closed down and the claimant has not been able to finish his insurance associate courses.

17. The claimant also testified that there is a strict procedure in the issuance of policy covers and the respondent had various departments in the processing of the same. On receipt of a new proposal he had to check and do a risk assessment and identify unacceptable risks.

18. In the allegations made by the respondent against the claimant, he testified that in the case of Maruti, they had high risk material and had the risk of inflammable materials been put into account, the policy payment would have been higher. The client was given a base rate. There was no risk note to the cover.

19. The claimant also testified that he admitted to the errors pointed to him by the CEO so as to safeguard his employment. The practice at the respondent was not to argue with the CEO but to admit and then address the error. He wrote several communications admitting various errors as he did not want an argument.

20. In support of the claim, the respondent called Oliver Anjenjo formerly with the respondent and testified that he witnessed the CEO shouting at the claimant in the presence of junior employees. Several employees were forced to leave employment due to frustrations by the CEO.

21. The 3rd witness in support of the claim was Peter Njoroge who testified that he is formerly with the respondent and worked closely with the claimant. The work environment at the respondent was poor and he resigned from his employment. The claimant had been forced to resign and when he refused, he was victimised and dismissed.

Defence

22. In defence the respondent's case is that the claimant was employed as the senior underwriting manager with duties outlined in his job description and which included negotiating with brokers and drawing contract, writing policies; keeping detailed and accurate records of policies and underwriting decisions. On 24th October, 2014 the respondent followed the provisions of section 45 of the Employment Act, 2007 by giving him an opportunity to be heard and issued with notice upon which the respondent was contemplating terminating his employment. The claimant was required to attend in the company of another employee but he chose to be alone. The reason for which the claimant's employment was terminated was due to core and operational functionalities of his duties. This was a fair reason and justified.

23. Though the claimant climbed up the ladder through the years, his tenure was with immense underperformance and negligence. There was negligence in signing letter to McLaren's Safety Surveyors dated 4th July, 2007 without authority; negligence in managing accounts with brokers; providing scanty reports and exposing the respondent's brokers; carrying underwriting duties without qualifications; giving conflicting information labour insurance covers and causing the respondent embarrassment; abdicating delegated duties; attaching wrong policy documents to policy documents; making unauthorised adjustments of client quotations contrary to IRA regulations; and approving premium refunds over and above the allowed limits.

24. Due process was followed before the claimant's employment was terminated on grounds of poor performance. The allegations made by the claimant against the CEO as baseless and without foundation. The claimant was invited to a disciplinary hearing on 3rd and 10th November, 2014 and he admitted to perpetuating omissions that were core to his work. The negligence and failure to undertake his duties diligence is evidence of incompetence and poor performance of allocated duties. The claimant had lapses in underwriting and claimants to Wondernut Limited; failure to check and review motor vehicles in respect to Nelion Insurance Brokers; failure to carry out pre-acceptance survey; gross under declarations of NK Brothers policies; failure to renew policy documents in respect of Sun Power Limited; neglect to automate and capture data of more than 80% of respondent customers; omission of counterchecking the Maruti Mining LOP policy; failure to incorporate warranty of Virat Builders Limited and Starplst and Dynamic Chemicals Limited; and failure to undertake risk and underwriting surveys of Textplast Industries Limited.

25. Other facts of poor performance by the claimant are that he issued lower premium rates without relevant authority. He failed to follow laid down procedures in risk management manual issued to him by the respondent.

26. The claim made of Kshs.64.4 million is not justified. The claimant was paid for 3 months' notice in accordance with his employment contract. The claimant contract gave a retirement age at 55 years and the claim for breach of contract is unfounded.

27. The claim for loss of property due to termination of employment has no basis and should be dismissed.

28. In evidence the respondent called two (2) witnesses, Ms Rita Thatthi and Anne Mbuve George.

29. Ms Thatthi testified that as the respondent CEO she worked closely with the claimant and severed the employment for justified reasons approved by the respondent board. The reasons were due to gross negligence of the claimant and deficiency in the academic qualifications. On 24th October, 2014 the respondent sent the claimant a detailed notice on areas of poor performance to which he was required to reply and show cause why he should not be dismissed from his employment. Such related to negligence in the performance of his duties, gross insubordination and breach of policy in his work duties. The claimant was suspended and invited to a disciplinary hearing where he opted to attend alone.

30. The letter dated 24th March, 2014 is by error as it was meant to read 24th October, 2014. The letter was issued to the claimant on the due date suspending him from duty. At the disciplinary hearing it was taken into account previous conduct of the claimant where he had admitted to negligence and poor performance and had made an apology in various instances.

31. The regulator in insurance business is the IRA which has strict regulations and severally reminded the claimant had failed in his qualifications. Put to task to produce his academic certificates, the claimant failed to comply. The certificates produced did not meet IRA recommended standards. The claimant was given time up to 2013 to comply but he failed to oblige.

32. The employment contract had a Clause on termination which the respondent followed.

33. The claimant was offered a mortgage facility of Kshs.7.2 million on 11th December, 2012. This was to enable him acquire a residential house and the listed property was valued. The loan facility and the employment relationship between the parties are distinct and each regulated under different agreements. The property is charged to the respondent and any sale at a loss would be in violation of the terms between the parties agreement.

34. The termination of the claimant's employment was procedural and justified.

The claimant should be dismissed with costs.

35. Ms George the Human Resource Officer of the respondent testified that she worked with the claimant and from records had the relevant evidence. In the contract of employment the claimant was provided with facility to obtain any qualifications in the line of his work and would be reimbursed by the respondent. Retirement age was at 55 years old. The respondent has provided a medical cover to employees for self, spouse and 4 children picked in the order listed by the employee up to the 4th child. There was no discrimination against the claimant as his own returns to the medical records were used as per the set policy. Where the claimant required to have the 5th child covered, he had the chance to pay. A memo was issued to all employees to this effect.

36. The claimant was sent for training to Rwanda and he declined. He cannot allege discrimination against him on the basis that he was denied facilities like other employees.

37. During the disciplinary hearing the witness sat in and took minutes but did not take decisions as this was a board function. Based on the allegations against the claimant his case was for summary dismissal but a decision was taken to terminate his employment and pay him for notice as under his employment contract.

38. The claimant had all the required information on his mortgage. Staff are given loans at 8% interest and upon exit from the respondent there is communication to recover the balance.

39. At the close of the hearing, both parties filed written submissions.

In the analysis of the case, I have put into account the pleadings, the oral evidence and written submissions by both parties. The issues that emerge herein are;

Whether there was unfair termination of employment;

Whether there is a violation of the fundamental rights of the claimant;

Whether there is a case of discrimination against the claimant by the respondent;

Whether the remedies sought are due.

40. On 10th November, 2014 the claimant was terminated from his employment with the respondent. The reason for termination is stated to be;

The disciplinary panel considered the matters levelled against you by management and your response. The issues that you are accused of are very serious. Some of them border on circumstances that could cause, if they have not already caused the company significant losses. Underwriting is the breadwinning department of any insurance company.

Your responses both written and oral have not been satisfactory. ...from your file, it is clear that the CEO has given you ample opportunity to improve and where you have erred, to make amends.

Unfortunately, there does not appear to be hope of improvement in this regard. We would like to remind you that this is a regulated company and the funds under the oversight of the management and the Board belong firstly to policyholders and potential claimants ...

.....we wish to inform you that, having considered the matter, the Company has decided to terminate your services have been terminated on grounds of poor performance and incompetence with effect from 11th November 2014. [underline added].

42. Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of section 41 of the Employment Act which require that such an employee should receive an explanation as to such a reason in the presence of another employee of their own choice.

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [underline added].

43. In addressing poor performance of an employee, the court gave the steps in the case of **Jane Samba Mukala versus OI Tukai Lodge Limited Industrial cause number 823 of 2010**; court held that;

Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 5(8) of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to state that one has been terminated for poor performance as the effort leading to this decision must

be established.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

44. It is common ground that the respondent operates in a regulated industry under the Insurance Regulatory Authority (IRA) and being in the insurance sector, the rules and regulation thereto as well as under the Association of Kenya Insurers (AKI). The claimant admitted in his evidence that he was given time to regularise his academic certifications and requirements under the IRA following various directives on the respondent to have the underwriting manager comply. By memo dated 1st October, 2014 the respondent wrote to the claimant;

Current position of your professional qualifications

Reference is made to the memo send to you ... dated 24th April 2014 in regard to the above subject. as the senior Underwriting Manager, you are expected to attain professional qualifications in two years from October 2013.

I wish to request you to update me on your progress in writing latest on 15th October 2014 so that I can also update the Insurance Regulatory Authority accordingly. ...

45. The claimant replied thereto vide letter dated 13th October, 2014 noting that he was unable to seat for his examinations and requested to be allowed to do so in April and October, 2015. He had hoped to have done 50% of his examination papers.

46. There is no reply by the respondent to the above request of the claimant. The question of poor performance thus addressed and noting the statutory threshold under section 41 of the Employment Act, 2007 the court in **Agnes Yahuma Digo versus PJ Petroleum Equipment Limited Industrial Cause Number 2049 of 2011 (21 February 2013)** Court held that:-

The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve within a reasonable length of time.

An employer, who fails to manage the performance of their staff, lacks moral authority to tell the staff that they have underperformed.

...

A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal.

47. The above is reiterated in the case of **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eKLR** the Court stated that:

Poor performance is an allegation that should be supported by evidence of specific performance targets, appraisal of performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on, and failed to meet. It was alarming to hear Mutuku say that the

e-mails exchanged between the Claimant and Laban constituted performance appraisal. The court has not found any evidence or material on record to conclude that the Claimant performed his work poorly...

48. Even where the claimant had admitted to failing in the provision of his academic records, he had not attended classes as required by the respondent and the regulator, IRA, the duty rested upon the employer in terms of section 41(1) of the Employment Act, 2007 and the jurisprudence now established by the court to put the claimant under an appraisal and assessment plan that was time bound to address his performance and any matter of alleged incompetence. Where the claimant remained in the employment of the respondent from 1996 to 2014 and rose through the ranks, the respondent or the regulator ought to have addressed his credentials. Where such was not addressed and it became urgent and apparent business requirement, a support plan for the claimant to attain the requisite qualifications became the duty of the employer.

49. It is not sufficient for an employer to state that they have facilities to support employees to advance their careers, resource allocate are diverse and relate to finances, time and personnel. Where the claimant pleaded for time to be able to cover his examinations, even where there was the offer to incur costs and seek a refund, I find no time allocated to him for this purpose.

50. For the respondent to use the reason of poor performance as a ground of terminating the claimant's employment then reason must be given to the support given to the claimant, the plan and time allocated for him to achieve the job requirements. The claimant could only have been assessed on the set targets which were time bound to arrive at a sanction of poor performance. Without a demonstration of the efforts put in place by the employer to support an otherwise poor performing employee, noting the number of years in the business and having performed well all along until the last year out of a total 15 years, then great caution should have been given by the employer as to the reasons leading to the sudden drop in performance.

51. In 2011 the respondent had started the time bound targeted training process for the claimant but this does not appear to have been followed through in a logical sequence to appraise the claimant. a new process was commenced in 2014. Vide email dated 1st December, 2011 the claimant while replying to a letter dated 30th November, 2011 to the CEO notes that he would register for his examinations as his earliest. The CEO replied on equal date seeking a detailed plan with a time frame within which the claimant intended to complete his professional examinations. on equal date the claimant replied and confirmed that he would start by taking 3 subjects and then progress thereon. That by 2013 he was to have completed his papers.

52. There is however no follow up on the above subject. What seems to have happened in 2014 is not directly correlated to the communication to the claimant of 30th November, 2011. The CEO directions that there was need for a detailed plan with time frames on how the claimant intended to address his professional qualification seemed to end with the promise by the claimant.

53. Ultimately, without the employer demonstrating the support given to the claimant, the reason given of his poor performance comes under challenge. It is rendered as not being valid and justified in terms of section 43 of the Employment Act, 2007 and thus amounted to unfair termination of employment.

54. On whether the claimant was discriminated against, the evidence that the claimant was treated in a discriminatory manner is not substantiated to the required standard. It does not just suffice that one is discriminated against on the basis that service and work benefits are given to employees and the claimant due to his circumstances was singled out. See **Collins Osoro versus AAA Growers Limited [2014] eKLR.**

55. Travel to Dubai by agents and brokers supported by the respondent, in my reading of the communications exchanged it was not a right stipulated under the claimant's contract of employment. Where this was a benefit due to agents and brokers working for and with the respondent, then it became a discretionary matter for the respondent to determine who was to benefit. The claimant cannot claim a

right thereto and or allege that his right against discrimination of his fundamental rights were violated and thus damages should be paid.

56. The claim that the claimant was discriminated against when his child was removed from the medical scheme is also a matter that was gone into in the claim. The medical benefit is a right under section 43 of the Employment Act, 2007. The benefit is due to the employee. By an employer going beyond the employee in their service to cover the family and other members, this is discretionary. It is not in statute or under the claimant's contract of employment to have his family covered indefinitely.

57. Where the practice of the respondent to cover the employee and spouse together with 5 children of the employee, the respondent made a change and posted a notice vide memo dated 9th June, 2014 to the claimant. Such notice and memo I find to comply with the provisions of section 13 of the Employment Act, 2007.

58. therefore, I find no case sufficient to support the claims for damages due to alleged violation of fundamental rights or discrimination against the claimant. No damages are due.

59. The claim for exemplary damages is made on the basis that the claimant was humiliated before his junior employees. He was denied permission to attend AKI task force and also got instructions from juniors sent by the CEO. It is the prerogative of an employer to allocate work. Where the respondent found it necessary that certain functions were best addressed by a given officer, and thus proceeded to remove such from the claimant, where the claimant was left without work, with his background and qualifications on the job, the only loss due is to the respondent as the employer. Failure to use the claimant in any given task where he was the best qualified to the task, the loss only arise to the employer for failure to utilise the best resource in their midst.

60. The claimant was specific with regard to training allocated to him to travel to Rwanda. He declined the offer on the grounds that the information was given to him by his junior instead of coming from a senior officer of the respondent. the travel to Rwanda seems to have come close to another travel that had been scheduled to Dubai where the claimant was left out and he felt most deserved to be in the team. The claimant declined to travel and attend training in Rwanda out of choice. He cannot revisit the same as a point for discrimination against him or that this made him suffer mental anguish or that he was differentiated from the rest and claim damages for a discriminatory practice or exemplary damages therefrom. Where the claimant was directed by his employer to attend training and he declined, without giving reasonable cause, this became a disciplinary matter. As this was not pursued by the respondent, the damages sought are not due. such cannot arise out of the given circumstances.

61. The claim for loss in selling property acquired while in employment and sold due to termination of employment follows the cause. The rationale is that there is a close nexus between employment and the employment benefits that go with it. As such, where an employee is able to get a benefit due to his employment and the employment is unfairly terminated, the benefit cannot be lost as had the employment not terminated unfairly such benefit would remain alive. In **Esther Mbinya Musau versus National Bank of Kenya Limited [2015] eKLR** the court held that;

...the Claimant while in the employment of the Respondent obtained a loan through the Staff Loan Policy such loan was lawfully granted under terms and conditions agreed upon by the parties and by virtue of the claimant's employment with the respondent. Such employment has since been terminated and the fairness or the unfairness of the same is under challenge.

62. In the case of **Abraham Nyambane versus Barclays Bank of Kenya limited [2013] eKLR**; the court held that;

I have no doubt in my mind that an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the

termination of employment, then the employer's right to withdraw the special loan facility advanced to the employee is withheld.

63. It is therefore of great importance that when considering termination of employment, the employer must put into account the substantive and procedural fairness into account as with any unfair termination with it other rights in employment must be addressed. The staff loan given to the claimant for purchase of a residential house followed his employment with the respondent.

64. Putting the above into account, the claimant testified that upon termination of employment his loan with the respondent was recalled and he was put under pressure following letter of 18th March, 2015 by the respondent that he had defaulted in his loan repayment and that from March, 2015 the loan would attract an increased interest rate. That he sold his house at a great loss and this amount of Kshs.4, 000,000.00 should be refunded by the respondent.

65. On 12th February, 2014 the claimant obtained a loan with the respondent for Kshs.500, 000.00 and in reply the respondent noted that his then outstanding loans were

Soft loan of Kshs.100, 000 – balance outstanding Kshs.26, 235

Mortgage loan of Kshs.7, 200,000 – balance Kshs.6, 807,545

He is pledging as security the property which has been charged to us and is security for the mortgage loan. The value of the property is Kshs.10 million including land and buildings.

We recommend that the loan be granted as the security is sufficient to cover the mortgage loan as well as the new loan of Kshs.500, 000.

66. There is therefore agreement between the claimant and Moses Malulu Injendi selling to him parcel of land No. **Ngong/Ngong/24414** situated in Kajiado County. The property was sold for Kshs.8, 000,000.00 while he had obtained a loan of Kshs. 7,200,000.00 from the respondent.

67. For the respondent to secure the loan allocated to the claimant it was charged and at the Titles Registry an encumbrance and charge over the parcel of land to Housing Finance company for the sum of Kshs.4,000,000.00 and a further sum of Kshs.720,000.00. The charged property was parcel **No. Ngong/Ngong/29503** in the name of the claimant.

68. The land was therefore encumbered for all intents and purposes for securing the loans given to the claimant. The claimant has attached a sale agreement between himself and Martha Nyaboke Mogusu for sale of land parcel **No. Ngong/Ngong/33208**.

69. Save for the discrepancy in the registered land parcel in the transactions between the claimant and the third parties land parcel No. **Ngong/Ngong/24414**; land parcel No. **Ngong/Ngong/29503**; and land parcel No. **Ngong/Ngong/33208** any land charged must be discharged before a legitimate sale to a third party. Where the claimant's property was charged by the respondent to secure the funds advanced to him and such remained in force, the sale to Martha Nyaboke Mogusu vide sale agreement on 23rd April, 2015 comes into question. I find no evidence that the land was capable of being sold to such person before the agreement and charge by the respondent was brought to account.

70. The claimant has submitted records of sale agreement with Moses Injendi where he acquired the land, there is an evaluation and loan from the respondent but the subsequent transaction with Martha Nyaboke Mogusu, and save for the sale agreement, there is no further evidence is paying the stated amount. A sale agreement on the face of it is not a conclusive record of payment of the stated sale amount. This being a claim made by the claimant and asserting a right, the burden of proof was on him to confirm the sale and payment for the land by the third party.

71. The loss of Kshs.4, 000,000.00 thus made by the claimant lack evidence. Such a claim cannot stand

on this background.

72. The remedy available is with regard to the unfair termination of employment only. Putting into account the provisions of section 45(5) of the Employment Act, 2007 the work record of the claimant where he has admitted to committing work errors, admitted to have submitted letters of apology due to negligence at work and logic of such apologies put into account and noting the responsibilities put upon the claimant due to his long years of service, compensation for unfair termination of employment shall assessed at three (3) months gross salary and herein assessed at kshs.1,200,000.00 only.

Accordingly, judgement is hereby entered for the claimant against the respondent for the sum of Kshs.1, 200,000.00 subject to the provisions of section 49(2) of the Employment Act, 2007. Each party to bear own costs.

Delivered in open court at Nairobi this 19th day of October, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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