



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 592 OF 2014**

[Formerly Industrial Court at Nairobi Cause Number 1686 of 2014]

**BETWEEN**

**NANCY W. NGATIA .....CLAIMANT**

**VERSUS**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Macheru Advocate instructed by Ndung’u Karanja & Company Advocates for the Claimant*

*Mr. Kiandi Advocate instructed by Muthoni Gatere Advocate for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed her Statement of Claim at the Industrial Court in Nairobi, on the 19<sup>th</sup> September 2012. The dispute was transferred to the Court in Mombasa on 17<sup>th</sup> November 2014. It is not clear why it was necessary to transfer the matter to Mombasa, the Claimant being a Resident of Nairobi, and having been employed at the Respondent’s Inland Depot at Nairobi.

2. The Claimant states she was employed by the Respondent on or around 24<sup>th</sup> August 1989 as a Records Assistant. She was confirmed as a permanent and pensionable Employee in the position of Clerk PAB, through a letter from the Respondent dated 10<sup>th</sup> November 2000. She requested for study leave from the Respondent on 4<sup>th</sup> December 2003. The Respondent approved the Claimant’s study leave, on 22<sup>nd</sup> January 2004. After her study the Claimant requested for reinstatement to her job, in a letter dated 25<sup>th</sup> March 2006. She was advised to reapply for the job in writing. By a letter dated 26<sup>th</sup> October 2009, the Claimant reapplied for her job. The Respondent declined to reinstate the Claimant alleging she had forfeited her job. The Claimant therefore approached the Court seeking the following orders against the

Respondent:-

- a. Unpaid salaries for the period between 1<sup>st</sup> January 2005 to-date at Kshs. 3,969,000.
- b. Unpaid annual leave at Kshs. 315,000.
- c. Unpaid house rent allowance at Kshs. 1,493,100.
- d. 3 months' salary in lieu of notice at Kshs. 189,000.
- e. 12 months' salary as compensation for wrongful termination at Kshs. 756,000.
- f. Damages for wrongful and unlawful termination.
- g. Certificate of Service.
- h. Costs.

3. The Respondent filed a Statement of Response on the 17<sup>th</sup> October 2013. The Respondent employed the Claimant as a Records Assistant on 24<sup>th</sup> July 1989. She was promoted and confirmed subsequently. She requested for 3 months unpaid leave on 1<sup>st</sup> August 2003 to attend to family issues. Approval was granted effective from 26<sup>th</sup> August 2003. She requested for and was granted an extension of this unpaid leave by 1 month. On 3<sup>rd</sup> November 2003, she sought study leave of 1 year to pursue a Business Management Degree Course in the United Kingdom. The Course was scheduled to begin on the 6<sup>th</sup> January 2004, and end in December 2005. She was granted 2 years study leave by the Respondent through a letter dated 22<sup>nd</sup> January 2004. This was on the following conditions: -

a] *The Respondent would not be bound in any way to re-employ the Claimant and to guarantee automatic promotion upon her completion of the study; and,*

b] *The Respondent would not be bound to accept liability related to damage, loss of property, misconduct, negligence, repatriation, or other liability relating to the Claimant during the study leave.*

She reapplied for her position on return. Her previous position had been substantively filled. She was advised she could not be re-employed. She was deemed to have forfeited her position. The Respondent further states the Claim is time-barred under Section 90 of the Employment Act 2007.

3. The Claimant gave evidence and closed her case, on the 4<sup>th</sup> June 2015. The Respondent testified through its Senior Human Resources Officer Irene Mbogho, on the 3<sup>rd</sup> September 2015 and 26<sup>th</sup> October 2015 when the hearing closed. Parties confirmed the filing of their Final Arguments to the Court at the last mention on 16<sup>th</sup> December 2015.

4. The Claimant testified she was employed by the Respondent as outlined in her Statement of Claim. She applied for study leave in November 2003. This was approved by the Respondent. Study leave was for 2 years, to end January 2006. She worked last at the Respondent's Inland Depot Nairobi. She went back to the Inland Depot on completion of her study, on the 19<sup>th</sup> January 2006. She was asked to reapply for her job.

5. She wrote reapplying but was not reemployed. Her position was filled by someone else. She kept writing to the Respondent asking to be taken back. She was rejected.

6. She was not to receive her salary and allowances for the duration of the study leave, but her name remained on the payroll. Her last salary was Kshs. 18,420 per month. She was never given a notice of termination of employment. The Respondent wrote to the Claimant on 9<sup>th</sup> March 2011 informing her that she had forfeited her appointment with effect from January 2005, in accordance with Section K.7 [g] of the Disciplinary Handbook 2007. Her Advocates issued the statutory notice upon the Respondent on 14<sup>th</sup> March 2011. She was still on the pay roll up to March 2011, but received no pay. She appealed against the Respondent's decision not to accept her back. The appeal did not succeed.

7. She testified under cross-examination that she first applied for leave for 3 months, which was granted.

She did not go back to work after the initial 3 months of leave. The first approval was on 19<sup>th</sup> August 2003 to end November 2003. It was extended on request by a month, to end December 2003. The Claimant resumed work in December 2003 but did not work after 27<sup>th</sup> December 2003. She had applied for study leave of 1 year, not 2 years, way before. The study was for 2 years, and the Respondent approved 2 years of study leave.

8. The Degree Course was self-sponsored, and not sponsored by the Respondent. It was a private affair, unrelated to the Respondent. It was agreed the Respondent was not obliged to retain the Claimant on the payroll. It was agreed the Claimant would forfeit her eligibility to salary and other benefits. It was likewise agreed the Claimant would reapply for employment at the end of her study.

9. She reported back on 19<sup>th</sup> January 2006. She did not write any letter on reporting. She was advised by the Respondent on 7<sup>th</sup> April 2006 to reapply. She reapplied on the 22<sup>nd</sup> May 2006. She was not taken back. She appealed. The Respondent declined her appeal in a letter dated 13<sup>th</sup> October 2008. She was not at work all this time. She completed her study, but did not have her Degree Certificate in her bundle of documents filed in Court. She last earned a Salary of Kshs. 18,420 in August 2003. She did not earn any salary subsequently.

10. The letter communicating forfeiture of appointment was addressed to the Claimant through her Manager Inland Depot. She received the letter on 6<sup>th</sup> April 2011. Forfeiture was stated to be effective from 1<sup>st</sup> January 2005. Nancy testified she ought to have been told she had forfeited her appointment instead of being told to reapply for the job. Redirected, the Claimant testified she had pressing family problems when she first sought unpaid leave in 2003. Her grandfather was ill. All applications for leave were approved. Study leave was to lapse January 2006. Forfeiture was effective 1<sup>st</sup> January 2005. 2 years had not lapsed. Her study would have added value to the Employer's business. The conditions given on approval of study leave did not imply she accepted termination of employment.

11. Irene Mbogho testified the Claimant was Senior Clerical Assistant in August 2003. She earned a monthly salary of Kshs. 18,420. She requested for study leave, and was granted 2 years of study leave. She did not go back to work in January 2006 at the end of her study.

12. The Claimant wrote to the Respondent on 7<sup>th</sup> April 2006 asking the Claimant to reapply for her position. She did so in May 2006. Her application was considered. The Claimant's previous position had substantively been filled. She was advised there was no vacancy. She appealed the decision. The Appeal was rejected and decision communicated to the Claimant in a letter dated 13<sup>th</sup> October 2008. She did not present her Degree Certificate to the Respondent to show she had graduated. The Respondent advised the Claimant she had forfeited her appointment, effective 1<sup>st</sup> January 2005. She did not render any service to the Respondent from August 2003, to justify arrears of salary as claimed. She was not in employment. Her study was self-sponsored, unrelated to the Respondent.

13. On cross-examination Irene testified she takes leave and always goes back to work. Many other Employees always take different forms of leave and many of the Employees always find their way back to employment. The Claimant took study leave and returned in March 2006. She asked for reinstatement but was not accepted back. She had worked for about 23 years at the time she left in August 2003. She should have been paid terminal dues if she presented her claim to the Respondent. She made a claim for final dues. Irene did not know if this was paid. Study leave was not the same as a resignation. She would still have been an Employee, if she had not taken study leave. She wrote to the Respondent indicating she had forwarded her Degree Certificate. Employment was forfeited effective 1<sup>st</sup> January 2005. The study leave was up to January 2006. The Respondent applied the Staff Regulations of 2008 in the process of forfeiture. There was another set of Regulations in 2002. The Disciplinary Handbook did not deal with study leave. The Human Resource Manual came into force in 2008. The Claimant then was not in employment.

14. Redirected, the Witness told the Court the Claimant was not entitled to salary and allowances under

Clause D.4 of the 2002 Staff Regulations, while on study leave. Until 21<sup>st</sup> January 2006, the Respondent still considered the Claimant to be on study leave. Study leave ended after 2 years, on 26<sup>th</sup> January 2006. She contacted the Respondent for the first time in March 2006. She was not an Employee in March 2006 having deserted. She did not attach any academic certificate in her letter to the Respondent. The forfeiture was a clearance procedure. The forfeiture Memo referred to other Employees as well who forfeited employment. She did not present herself to collect terminal dues.

*The Court Finds:-*

15. The issues as understood by the Court are: -

- a) Whether the Claim was filed out of time;
- b) Whether the Claimant's contract of employment was lawfully and fairly terminated; and
- c) Whether she merits the remedies listed in her Claim.

16. Limitation of time: The evidence indicates the Claimant and the Respondent were engaged in communication on the Claimant's employment status, between 2006 when she returned from the UK, and 9<sup>th</sup> March 2011 when the Claimant was unequivocally informed by the Respondent she had lost her job, through forfeiture. The arrangement was that she would reapply for her job on return from the UK. She did so in May 2006. The application was declined. There was provision for appeal. She appealed and the Appeal was rejected by the Respondent through a letter dated 13<sup>th</sup> October 2008. She made further reapplication for her job on 29<sup>th</sup> October 2009. It was not until 9<sup>th</sup> March 2011 that the Respondent wrote to the Claimant advising she had forfeited appointment. Even this letter advised there was room for further appeal. The Claimant filed her Statement of Claim on 19<sup>th</sup> September 2012, which the Court is persuaded was within the 3 year period allowed under Section 90 of the Employment Act 2007, the action having accrued on 9<sup>th</sup> March 2011 when forfeiture was communicated to the Claimant.

17. Termination/ forfeiture fair and lawful? The Claimant asked for and was granted unpaid leave of 3 months with effect from 26<sup>th</sup> August 2003 to attend to personal issues. She asked for extension by one month, which was granted up to 27<sup>th</sup> December 2003. At the end of her 4 months of unpaid leave, she applied for 1 year of study leave to pursue a Degree Course in the UK. Clause D.4 of the Respondent's Staff Regulations 2002 entitled an Employee to 1 year of study leave, at the discretion of the Managing Director. The Clause states that the Employee would forfeit eligibility to all salary and benefits to self and family during such leave.

18. The Claimant was to attend a 2-year Degree Course. She was granted study leave of 2 years, the additional 1 year, perhaps, being also in the discretion of the Managing Director to grant. The letter granting the Claimant 2 year study leave is dated 22<sup>nd</sup> January 2004. It states that the Claimant:-

- Would have to reapply to be considered for fresh employment on return.
- The Respondent would not be bound in any way regarding the re-employment and any automatic promotions arising thereof.
- The Respondent would not be bound to accept liability for the Claimant, related to damage, loss of property, misconduct, negligence, repatriation and other forms of liability relating to the study leave.

19. The Claimant was to end her 2 year study leave on or around 23<sup>rd</sup> January 2006. She returned to the Country sometime in 2006, and wrote to the Respondent a letter dated 25<sup>th</sup> March 2006, reapplying for her previous job. Irene Mbogho wrote to the Claimant on 7<sup>th</sup> April 2006 advising the Claimant applies for fresh employment. It appears the letter of 25<sup>th</sup> March 2006 was not considered by the Respondent, to amount to a job reapplication. The Claimant wrote a second letter dated 22<sup>nd</sup> June 2006. The Respondent

wrote to the Claimant on 19<sup>th</sup> June 2006 advising her, her position had been substantively filled.

20. There followed a series of Appeals by the Claimant to the Respondent, asking to be reinstated. The Appeals were serially rejected. The final word from the Respondent was communicated in the forfeiture of appointment letter dated 9<sup>th</sup> March 2011. It informed the Claimant that she had forfeited her appointment, with effect from 1<sup>st</sup> January 2005. The Respondent cited Section K.7 [g] of the Disciplinary Handbook of 2008. The Court is of the view that the terms and conditions of the study leave were explicit, in the letter authorizing such leave, dated 22<sup>nd</sup> January 2004, as outlined in paragraph 18 above. The Claimant's contract was effectively terminated with the grant of the study leave. This was, strictly speaking, *not a study leave, but a complete study release*. She was to apply for her job afresh, which in the understanding of the Court, meant there would be fresh terms and conditions of employment on the Claimant's return. She would be treated as a new Job Applicant, and if employed, as a new Employee. Parties were not bound by the old terms and conditions of service. The Claimant was not bound to return to employment in her old role, or at all. Her service with the Respondent was unequivocally ended, rather than interrupted by the study leave. There would be no requirement to reapply for a job, if there was no termination. Parties completely discharged each other from mutual obligations on 22<sup>nd</sup> January 2004. The Respondent was not bound to re-employ her. It was not bound to pay her any salary or allowances for the period of the study leave. This was all anchored on the Staff Regulations of 2002.

21. It did not prejudice the Claimant that she was advised in the forfeiture of appointment that forfeiture was from the 1<sup>st</sup> January 2005, while her study leave was ending January 2006. She was not an Employee of the Respondent from the date she took her study leave. She was not earning any salary or allowances; she was on a private mission abroad; she had undertaken to apply for a job with the Respondent afresh upon return; and the Parties were clear there was no guarantee of resuming their employment relationship at the end of the study leave. The Claimant, in the understanding of the Court, was not bound to return to the Respondent; she could have freely sought employment with a different Employer at the end of her study.

22. Termination of the Claimant's contract took place in January 2004, and was consensual. The fault in the Respondent's handling of the process lies in the failure to clearly communicate termination to the Claimant, at the time she left for her studies and upon return. The persistent advice to the Claimant to reapply for the job, and to appeal refusal to reemploy, comprised a very dicey process, which perhaps served to create expectation in the mind of the Claimant, that she could find her way back to the Respondent's workplace, the reapplication being a mere formality. The delay in communicating forfeiture of employment, added on to this lack of clarity in the mind of the Claimant, on her engagement with the Respondent. The application of the Handbook of 2008, to an occurrence of 2004, amounted to retroactive application of regulations and was wrong. There was considerable merit in the Claimant's position that the Respondent should have advised her, her appointment had been forfeited at the time she asked to be re-employed, rather than encourage her to reapply, and appeal refusal to reemploy, before finally communicating termination on the 9<sup>th</sup> March 2011. In the view of the Court, the Respondent should indeed have communicated termination of employment to the Claimant, in clear language, at the time she left for the UK. Use of the term '*forfeiture of appointment,*' years later, rather than plain '*termination of employment,*' or even '*dismissal on the ground of desertion,*' was obscure.

23. The Court does not however see these defaults of procedure, as being of a fundamental nature warranting the Claimant to be paid damages by the Respondent. She was aware of the terms and conditions of her study leave, and barring the encouragement from the Respondent, had no reason to expect return to the Respondent's workplace at the end of her study. She was free to work for other Employers. The claim for arrears of salaries from 1<sup>st</sup> January 2005 has no merit. The Claimant forfeited her right to earn salaries and allowances when she took her study leave. She has no rightful claim to accumulated annual leave pay and house rent allowance. She was not an Employee of the Respondent after 22<sup>nd</sup> January 2004. There is no justification in the prayer for notice pay, termination having been consensual. The Respondent should however have paid to the Claimant her terminal benefits, and all pension dues dating up to 22<sup>nd</sup> January 2004. She had worked for 23 years. It was not necessary that the Claimant makes a demand to be paid her terminal benefits, as suggested by Irene. The Court Orders:-

- a. Termination of the Claimant's contract was through the consent of the Parties contained in the letter dated 22<sup>nd</sup> January 2004.*
- b. There was no obligation on the part of the Respondent to re-employ the Claimant, at the end of the Claimant's study leave.*
- c. The claims for arrears of salaries, notice pay, compensation and/or damages, house rent allowances and annual leave pay arrears, have no merit.*
- d. The Respondent shall however pay to the Claimant her terminal benefits and pension calculated up to the 22<sup>nd</sup> January 2004.*
- e. The Respondent shall release the Claimant's Certificate of Service*
- f. No order on the costs.*

Dated and delivered at Mombasa this 18<sup>th</sup> day of March, 2016

**James Rika**

**Judge**