



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 128 OF 2011**

(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> March 2016)

**CHARLES MUTURI MWANGI .....CLAIMANT**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant filed an amended Memorandum of Claim dated 9<sup>th</sup> May 2013 via the firm of C. N. Kihara and Company Advocates where he seeks the following prayers:
  - a. *Immediate release of the investigation report.*
  - b. *Clearance certificate from the purported investigation and an apology to that effect.*
  - c. *Reinstatement to earlier position without loss of salary, annual increments and benefits as per the contract of service.*
  - d. *A declaration that the purported suspension was unlawful and that the Claimant is entitled to the Prayers sought.*
  - e. *Payment of the sums pleaded in Paragraph 14 i.e. particulars of special damages/unpaid salaries and allowances amounting to Kshs. 1,080,000.00 and interest from due dates.*
  - f. *Interest at the compounded commercial rate of 25% per annum from the 17<sup>th</sup> of December 2007, until payment in full.*
  - g. *Costs of this suit.*

**Facts of the Case**

2. The Claimant avers that he was employed as a Marketing General Manager, by the Respondent

Assurance Company.

3. The contract terms were on permanent basis running for a minimum period of three (3) years with a basic salary of Kshs. 400,000/= per month; entertainment allowance of Kshs. 200,000.00; leave allowance of Kshs 100,000.00 per annum; mileage allowance of Kshs.92,500.00; mobile phone airtime of Kshs.15,000.00; entrance/membership fees for one members clubs of the employees choice; medical expenses of the employee, spouse and up to five (5) children under the age of 25.
4. He was also provided with a pension scheme, thirty (30) days annual leave and payment in lieu of leave accrued due but not taken as at the date of termination.
5. The salary was to be reviewed by the Board from time to time or on or around the anniversary of employment.
6. The Claimant avers that termination of his contract was only to be determined by one of these three ways:
  - a. ***By the company without notice or payment in lieu of notice if the employee is guilty of any gross default or misconduct in connection with or affecting the company business or non-observance by the employee of any of the stipulation contained in this agreement which is materially detrimental to the company's interest.***
  - b. ***Subject to Clause 2 of this contract by either party upon giving the other not less than six(6) months' notice in writing or payment of six(6) months in writing or payment of six(6) months' salary in lieu of notice.***
  - c. ***In the event of any termination of this contract by either of the parties herein, otherwise than as stipulated in sub-clauses (a) and (b) above, the party thus terminating this employment contract shall pay on demand in writing to the other party, an amount of money equivalent to the aggregate salary value of the remainder of the contract period, that it to say, the salary as stipulated in clause 5(1) (a) above multiplied by number of months remaining in the contract period as at the time of such termination.***
7. The Claimant states that he worked diligently from June of 2006 without any knowledge of any shortcoming within the department. However, he received a letter of suspension of his duties with immediate effect which was not from the Board of Directors whom he contractually reported to but was from the Respondent's Chief Executive Officer Mr. Dave Leteipan.
8. He was further requested to hand over all documents to Mr. Makanga who immediately took over his office and work.
9. The Claimant states that via letter dated 8<sup>th</sup> January 2008, he wrote to Chief Executive Officer noting that his contract did not provide for suspension from duty, he never received any adverse reports from the board regarding marketing activities, marketing funds were managed by various branches and all monies collected had been utilized as per the company policy and finally that the purported investigation and audit ought to be carried out expeditiously so that he can be accorded with an opportunity to defend himself in line with the rules of natural justice.
10. He wrote a further letter dated 13<sup>th</sup> February 2008 seeking to be paid the unpaid and withheld salaries for four months despite numerous promises from the Chief Executive Officer.
11. The Claimant suffered financial difficulties due to the withheld salaries and other dues which then resulted to failure to make scheduled loan repayments.
12. The Respondent appointed a Statutory Manager with effect from 29<sup>th</sup> of February 2008 to manage the state of affairs of the Respondent and submit a report on its financial status with

recommendations of revival or liquidation.

13. The Claimant however avers that the appointment did not terminate or affect any employment of an employee, or discharge any creditors' debt, nor affect the rights and obligations of the Respondent as an insurer, or debtor, its policy holder and creditors.
14. The Claimant still retains that his services could only be terminated by the Board of Directors which is yet to be done.
15. The Claimant relies on the case of **McClelland vs Northern Ireland General Health Services Board [1957] 1 WLR 594 at 599** where the House of Lords held, in allowing an appeal from the Court of Appeal of Northern Ireland, that on the true construction of the terms and conditions of service and the express powers of the board to dismiss an officer were comprehensive and exhaustive and no further power could be implied.
16. On the issue as to whether the parties contemplated a termination of the Claimant's service on any other term, or the indefinite suspension, the Claimant's submit that on true construction of the service contract terms, this was not envisaged, and the indefinite and the inordinately long period of suspension has been oppressive, caused hardship to the Claimant and indeed had the effect of condemning him to servitude contrary to his labour and constitutionally ingrained rights without affording him the right to be heard and the due process of the law.
17. The Statutory Manager did not terminate the Claimant's employment nor did he lift his suspension he only suspended the enforcement claims, legal proceedings and held creditors at bay and suspended time of these claims from running.
18. On the issue of Employment Contract the Claimant relies on the case of **Mary Nyangari Ratemo & 9 Others vs Kenya Police Staff Sacco Limited – Utumishi Investment** where the Court held that where there is a change on the status of an employee with regard to a written contract of work or a letter of appointment, the duty rests with the employer to ensure that they make a written communication to the affected employee with regard to the changes.
19. On the issue of administrative disciplinary process started by the employer the Claimant relied on the case of **Joseph Mutuura Mberia vs The Council JKUAT** where it was observed that the employer is at liberty to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the administration of disciplinary process the continuation of his employment.
20. It further observed that all employees who get dismissed or suspended and believe that they are innocent have their reputations tarnished by their dismissal or suspensions. These it said eventually gets an opportunity to be heard where the employers should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits.
21. Further in **Mulwa Msanifu Kombo vs Kenya Airways** the Court held that it will intervene in an administrative procedure, if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or if the procedure is in clear breach of the agreed or legislated or employers prescribed applicable policy or standards.
22. On the issue of payment of salary, allowances and benefits from date of suspension to date, the Claimant relies on the case of **Paul Ngeno vs Pyrethrum Board of Kenya** where it was found that the Respondent never lifted the suspension at any point prior to the redundancy.
23. It was the Court's opinion that the Claimant remained on suspension until 12.11.2010 because the suspension was never lifted to pave way for the redundancy, suspension had not been concluded, it was not open for the Respondent to purpose to initiate another termination process namely redundancy procedure.

24. The Claimant further avers that the termination must be in writing and refers to the case of **Elizabeth Ngina vs East African Safaris Air Express** where it was stated that it is important to restate that every employer has a right to terminate the services of any employee..... however which mode of termination applicable in any case, the same must be in writing.
25. The Claimant further submits that in awarding the claim, the Court ought to take into consideration potential salary increments, and relied on the case of **Gedo Abdulahi Mohammed vs Commissioner of Police** where it was held that the computation of salaries and emoluments payable to the petitioner for a period of lost services shall take into account all pay rises and annual increments amounts that would have been payable to the petitioner had he continued in service.
26. On changes of management or leadership the Claimant relies on the case of **Njonjo M. Itotia vs Kenya Chamber of Commerce** where it was held that whatever an employer is going through profit or losses, where they have been employees involved, due process for termination of these employees must be done in accordance with the law.
27. Whether there is new management in force or changes in leadership, the rights of employees must be protected whatever the problem or changes. All dues accruing and unpaid at the time of termination were held payable. These included any benefit expenses or allowances owed at the date of termination.
28. On the interest from the date of suspension the claimant relied on the case of **Julius Gatete Ihomba vs Well Fargo Limited** where it was found there are statutory protected dues to the Claimant from the date when they fell due. The Respondent was ordered to pay with interest at court rate from 14.01.2010 when the amount became due and owing to the Claimant
29. They also relied on the case of **Patrick Lumumba Maikava Vs KPA [2012] eKLR** where the Court first awarded the Claimant notice pay. The Claimant was also entitled to all the unpaid salaries accruing from the date of suspension to the date of termination. The claimant was also entitled to cash payment in lieu of any accrued leave days upto the date of termination.
30. In conclusion, the Claimant submits that they should be awarded the loss and damages as enumerated in the memorandum of claim.

### **Response**

31. The Respondents have filed a statement of defence dated 14<sup>th</sup> August 2013 *via* the firm of Gichuki King'ara and Company Advocates.
32. The Respondent avers that the claim is time barred within the provisions of Section 90 of the Employment Act, 2007, the Claimant agrees that the case has been filed after three years had lapsed and urge the court to hold that the whole suit is time barred.
33. They further deny the claim save for paragraph 1 and 2 of the memorandum of claim and aver that this it is grounded on the unfounded assumption that the claimant is still employed by the respondent more than 8 years after his contract was terminated.
34. They state that this presumptions by the Claimant are completely against the sound and established judicial principle of fair go round which dictates against awarding of anticipatory salaries and rely on the case of **D.K Marete vs The Teachers Service Commission** where the court held that employment remedies must be proportionate to the economic injuries suffered by the employed.
35. These remedies are not aimed at facilitating unjust enrichment of aggrieved employees but they are meant to redress economic injuries in a proportionate way. The Honorable Court accordingly

declined to grant anticipatory salaries and allowances for a period of 11 years.

36. This same position was reiterated in **Mariah Kagai Ligaga vs Coca Cola East Africa Limited** where the court has a duty to observe the principle of fair go all round. Having found this, the Court refused to grant anticipatory salaries and allowances as well as to grant multiple damages, on the rationale that the employees must not be encouraged to replicate injuries and seek for multiple remedies.
37. They also rely on the case of **Menginya Salim Murgani vs Kenya Revenue Authority** where the Honorable Justice J. B Ojwang stated that it would be injurious to find an award of damages upon sanguine assessment of prospects. It observed that he was able-bodied, intellectually and professionally well-endowed man, likely to find occupational engagement outside the Respondents employ. This was in keeping with the civil law principle that an aggrieved party has the obligation to mitigate his or her own losses.
38. The Respondents aver that the claimant was not solely coerced by the respondent to leave lucrative employment but he opted for a better deal on his own free will.
39. They further state that the financial difficulties suffered by the Claimant could not only be attributed to a lack of salary as financial institutions consider a lot more than pay slip when awarding loans. They urge the court to disregard the Claimants' allegations on this account.
40. As to the issue of payments due to a members club, the respondents also argue that as the Claimant had not joined one, payment due to a nominated club should not be awarded.
41. On the issue of permanent and pensionable employment, the Respondents state that employment contracts do contain exit clauses and the fact that they can be referred to as permanent and pensionable does not necessarily mean that it cannot be terminated.
42. In this instance, they refer to the case of **Engineer Francis N Gachuru vs The Energy Regulatory Commission** where the Court found that the Claimant was not entitled to loss of income till the date of retirement as there was no guarantee of employment to the date of retirement and disallowed the same.
43. This they argue implies that the Claimant was negligent and complacent towards mitigating his own position while considering himself a perpetual employee of the respondent where he would eventually be paid colossal sums of money for no service or consideration at all going against the principles grounded in the Industrial Relations Act of 2007 where it provides that:
- “The opportunities available to the employee in securing employment with another employer, and, Any failure by the employee to reasonably mitigate losses attributable to the unjustified termination”.***
44. The Claimant they argue, ought to have moved on in the 8 years where he was unemployed. They refer to the case of **Addah Adhiambo vs ARD INC** where the Hon. Lady Justice Maureen Onyango asserted that the plaintiff in the matter should have moved on as it was more than two years since her contract was terminated and dismissed her claim for future anticipatory benefits.
45. The Claimant has approached the Court claiming to still be employed by the Defendant, however, he wrote two demand letters dated 6.04.2010 and 22.04 2010 claiming for terminal dues which in fact can be an admission by himself that his services were terminated.
46. The Respondent further states that the Claimant's argument to still be under their employ while it was under legal moratorium is naught as the Respondent was prohibited from issuing any new

policies during the subsistence of the moratorium.

47. As to the claim for terminal dues, the Respondents claim that these dues were remitted by themselves to Brittak the staff pension scheme administrator, and the Claimant even admits having withdrawn Kshs. 600,000.00 from the scheme in the year 2012 which amount he is yet to deduct from his claim.
48. The Respondent also states that the Claimant admitted that fuel and mileage allowance were one and the same thing hence his claim for both items is a duplicate, further he is alleged to have been authorizing his own travel requests as head of department yet he had a supervisor going against the operational structure of the organization.
49. As to his claim for unfair dismissal and the salary demand for the unexpired period of 18 months, the Respondent argues that the claimant was in fact dismissed summarily under Clause 10(a) for gross misconduct in connection with affecting the business interests of the Respondent.
50. The Respondent led evidence indicating that the Claimant was responsible for channeling marketing float to a pool of in house agents employed by the Respondent commonly referred to as the Direct Sales Force. The Respondent attached in its bundle of documents numerous vouchers signed by the Claimant after collecting hundreds of thousands to channel to the agent which monies never reached them.
51. They also state that it is now an established principle in awarding damages on termination of fixed term contracts before they expire that the remedy of damages based on salary for the unexpired period of service is neither available nor contemplated in law under Section 49 of the Employment Act. They refer to the case of **Alphonse Mghanga Mwachanya vs Operations 680 Limited** where the Hon. Justice Radido said in paragraph 47:

***“Further, it would not make sense and cannot be the intention of the Employment Act or the Industrial Courts Act to award employees whose fixed term contract have been terminated prematurely, generous damages equivalent to the salary which could have been earned during the remainder/unserved term of contract and restrict compensation to a maximum of 12 months for employees who were in permanent employment, but were terminated unfairly. It would not be fair and just as a matter of legal principle to treat employees on fixed term contracts differently from those employed on permanent contracts, who have been unfairly terminated.”***

52. As to the quantum of the claim the Respondents argue as follows:

***“Unpaid salary for September 2006, October, November and December 2007, the respondents state that documents now un-earthed show he was fully paid all his arrears, moreover, he was not entitled to salary in the month of December 2007 as he was firstly suspended and there after terminated and did not render any material service to the respondent in that month”.***

53. On unpaid allowances for September 2006, October, November and December 2007, the Respondents state that marketing activities giving rise to these allowances had to be approved by the director in charge of marketing and supported and approved for reimbursement by the finance manager.
54. Documents attached at page 134 to 185 of the Respondents bundle of documents show that vouchers indicating marketing expenses incurred by the claimant were paid on reimbursement basis.
55. They also argue that fuel allowance claimed is not due to the claimant when he was not engaged in employment with the Respondent. It is a well-established principle that fuel, telephone and entertainment allowances are tools ancillary, necessary and tied to the performance of duties assigned to or being performed by a marketing employee and which become inapplicable upon

termination of employment. They refer to the case of **Kenya Union of Employees of Voluntary and Charitable Organizations vs Nairobi Pentecostal Church Christ** is the Answer where the honorable court declined to make this award for fuel allowance for the same reasons.

56.They argue that leave allowance for a period of 7 months is not due as the claimant worked for the Respondent for a period of one and a half years only and there is no way leave allowance could accumulate for more than two months during this period as leave allowance is only payable once a year.

57.Pension demand for Kshs 2,160,000/- is only due for the period the Respondent was engaged with the claimant that is June 2006 until December 2007 and not May 2013. Moreover, it remains the Respondents case that all pension deductions due were remitted to the scheme administrator Brittak.

58.On medical cover costs demanded, they aver that this is not due as the Respondent retains that the Claimant was terminated in December of 2007 and medical cover was part and parcel of the contract. However, the Respondent did call a witness who outlined how this service worked and in claiming, reimbursement for outpatient, invoices were required to be attached and the Claimant did not produce any invoices.

59.They aver that club members joining fee, as earlier said, the Claimant did not join any club and is therefore not entitled to the claim.

60.As to notice period claimed they submit that Claimant is not entitled as he was clearly terminated for gross misconduct affecting business with the company.

61.They are that reinstatement is not a remedy available to the Claimant as the persons who employed him are no longer owners of the company and his position has been taken up by another employee and moreover, 8 years have lapsed since he occupied that position.

62.The Respondents state that Courts have consistently held that contracts of personal service are on a willing employer employee relationship and Courts cannot compel unwilling parties to engage in contractual agreements.

63.In view of all the foregoing, and flagrant/gross failure by the claimant to support the same, the Respondents urge the court to dismiss the claim.

64.Upon considering the evidence adduced by both parties and their respective submissions, the issues for determination are as follows:

1. ***Whether this claim is time barred.***
2. ***What was the status of the Claimant with the Respondent after 29<sup>th</sup> February 2008 when the Respondent was placed under Statutory Management?***
3. ***What remedies are available to the Claimant if at all.***

65.On 1<sup>st</sup> issue, the Claimant avers that he was placed on suspension on 14/12/2007 and the CEO Mr. Dave Leteipan ordered him to hand over the office immediately. At the time, his 3 year contract was to expire on 5.5.2009 and so the time pending was about 1 year 4 months. The Claimant avers that at the time of filing this case on 2/2/2011, he had not been reinstated.

66.To understand whether this matter is time barred or not I examine the fact that the Claimant was suspended from duty on 14/12/2007. Thereafter in February 2008, a Statutory Manager was appointed to run the affairs of the Respondent.

67.The Manager appointed was given duties to manage the Respondent for 12 months and given

- appropriate recommendations or revival or liquidation. The Manger as part of his duty in this regard was also to manage employees either on duty or suspended or in whichever capacity.
68. Unfortunately, the Receiver manager never addressed the position of the Claimant and this remained so until his contract expired on 5.5.2009.
69. It is this Court's finding that time did not start running until 5.5.2009 when the contract expired. This claim was filed on 2/2/2011 without the Respondents addressing the position of the Claimant again and so it is my finding that within this period, from 5/5/2009 to 2/2/2011, the Claimant was within the limitation period of 3 years provided under Section 90 of Employment Act 2007 and therefore this claim is not time barred.
70. On the 2<sup>nd</sup> issue, the Claimant was an employee of the Respondent. Even after the Respondent was placed under Statutory Management on 29<sup>th</sup> February 2008, the Claimant remained an employee. The work of a Statutory Manager is to manage the affairs of the "company during its turbulent times".
71. The Statutory Manager was appointed to manage the affairs of the Respondent for a period not exceeding 12 months and was also required to prepare and submit to the IRA a report on the financial position and management of respondent with appropriate recommendations on revival or liquidation.
72. During this period, the position of Claimant remained as a suspended employee. It was part of the duty of the Receiver Manager to manage employees whether on suspension or on duty. It is apparent that the Statutory Manager however never addressed the Claimant's suspension until the 12 months period.
73. During this period, the Statutory Manager declared a moratorium which included stoppage of time running even for purposes of limitation. As part of his duty the Statutory Manager should have communicated with the Claimant to explain his position with the Company but since there was no communication, the Claimant remained on suspension and it is this position that he remained so suspended until his contract expired on 5.5.2009.
74. Given that the Claimant was on suspension from the period of 14/12/2007 to 5/5/2009, it is this Court's role to examine whether the suspension was justified or not.
75. I have looked at the contract of employment between Claimant and Respondent dated 3/5/2006 but which does not list any disciplinary processes.
76. The only provision stated is the arbitration clause which states that where there is any dispute arising out the contract, the matter will be referred to arbitration appointed by both parties. If the parties don't agree the matter may be referred to the Chartered Institute of Arbitrators (K) Chapter.
77. It appears that both parties opted out of this clause as none of them have addressed it in these proceedings. That being the case, this Court relies wholly on the provision of Employment Act 2007 in determining the best way of resolving this claim.
78. 1<sup>st</sup> and foremost, in disciplinary issues, the mode followed before drastic action is taken against an employee is to investigate an alleged misconduct.
79. The employee is then notified in writing of the mistake or misconduct alleged to have been committed and asked to show cause why disciplinary proceedings may not be instituted against him It is only after the employee has explained himself that a suspension/interdiction may follow.
80. In the case of the Claimant, there is no evidence that this was done and so from the onset the process taken against the Claimant was flawed.

81. Further to this, the suspension remained pending for a long period. This Court has pronounced itself on this point in other cases stating that a reasonable disciplinary process should not exceed 6 months unless there are valid reasons to extend the period.

82. In the case of the Claimant, the suspension remained until the contract expired. It is this Court's finding that the suspension was unfair and unjustified and it amounted to a termination where there was no communication as to the next cause of action.

83. That being the case, the Claimant is entitled to the unpaid salary for the remainder of the contract period being from 14.12.2007 to 5.5.2009 when he remained on suspension which is = **16 months 21 days salary. The salary of Claimant was 400,000/= per month.**

$$= 400,000 \times 16 = 6,400,000/=$$

$$\text{plus 21 days} = 280,000/=$$

$$\text{Total} = \underline{6,680,000/=}$$

*Other than the salary, the Claimant is also entitled to leave allowance = 100,000/= for year 2009*

$$\text{Total} = \underline{6,780,000/=}$$

**Less statutory deductions**

**I also award Claimant costs of this suit plus interest.**

84. The other claims for medical expenses were on reimbursable basis and so are not tenable. Also the claim for club membership is not tenable without proof that the Claimant paid for himself the amount in question.

**Read in open Court this 15<sup>th</sup> day of March, 2016.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ndolo holding brief for Kihara for Claimant

No appearance for Respondent